Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

REVEREND WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI

Petitioners,

v.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

RICHARD F. COLLIER, JR.(Counsel of Record)
KEITH E. PATERSON
RICHARD J. TRAYNOR
LEGAL CENTER FOR THE DEFENSE OF LIFE, INC.
65 Madison Avenue
Morristown, NJ 07960
(201) 984-0725

8 pp

QUESTIONS PRESENTED

1. In *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), this Court replaced the "reasonable time, place and manner" analysis to be applied to injunctions with the more rigorous standard of "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) this Court required "precision of regulation" with regard to injunctive relief which burdens speech, protecting and separating peaceful speech from unprotected non-speech activities. Against this background the first question asked is:

   > Whether the decision of the New Jersey Appellate Division upholding an injunction which prohibits speech in front of an abortion clinic, without any showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, is inconsistent with this Court's decision in *Madsen*.

2. The second question is:

   > Whether the decision of the New Jersey Appellate Division, in upholding an injunction which prohibits speech by defendants who did not engage in unlawful acts or violate preliminary restraints, burdens more speech than necessary to serve a significant government interest.

PARTIES

The Petitioners are as follows: Reverend Walter J. Robokoff, Kathleen Bates, Steven Natiello and Michele Sterlace-Accorsi.

The Petitioners were defendants in the New Jersey Chancery Division and Appellants in the New Jersey Appellate Division. They were also petitioners in the New Jersey Supreme Court.

The Respondent is as follows: Women's Choice of Bergen County, P.A. The Respondent was the plaintiff in the New Jersey Chancery Division and Cross Appellant in the New Jersey Appellate Division. It was also a cross-petitioner in the New Jersey Supreme Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED I

PARTIES ii

DECISIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

STAGE AT WHICH, AND MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED BELOW 4

ARGUMENT

I. The State Court has Decided Two Federal Questions of Constitutional Importance In A Manner Inconsistent With Applicable Decisions of This Court 5

A. THE *MADSEN* CASE PROHIBITS THE NEW JERSEY COURTS FROM ENJOINING FREE SPEECH WITHOUT SHOWING THAT THOSE ENJOINED HAVE VIOLATED OR WILL VIOLATE APPLICABLE LAW . 7

B. THE *MADSEN* CASE PROHIBITS THE NEW JERSEY COURTS FROM ENJOINING FREE SPEECH WITHOUT SHOWING THAT THOSE ENJOINED HAVE

VIOLATED OR WILL VIOLATE APPLICABLE LAW. . 8

CONCLUSION 9

APPENDIX

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS , JULY 13, 1989 . . . . . A-1

INTERLOCUTORY INJUNCTION, AUGUST 8, 1989 . . . . . A-5

CHANCERY DIVISION OPINION, FEBRUARY 19, 1992 . . . . . A-10

CHANCERY DIVISION ORDER MARCH 27, 1992 . . . . . .A-32

APPELLATE DIVISION OPINION JULY 1, 1993 . . . . . A-36

NEW JERSEY SUPREME COURT ORDER APRIL 7, 1994 . . . . . A-39

CHANCERY DIVISION SUPPLEMENTAL OPINION MARCH 14, 1995 . . . . . A-40

CHANCERY DIVISION ORDER APRIL 7, 1995 . . . . . A-49

APPELLATE DIVISION OPINION APRIL 25, 1996 . . . . . A-53

CHANCERY DIVISION ORDER
JUNE 25, 1996 . . . . . A-64

NEW JERSEY SUPREME COURT ORDERS
SEPTEMBER 25, 1996 . . . . . A-68

TABLE OF AUTHORITIES

Page(s)

CASES

City of Houston v. Hill,
482 U.S. 451, 462 n.11 (1987) 4

Madsen v. Women's Health Center,
___ U.S. ___, 114 S.Ct. 2516,
129 L.Ed.2d 593(1994) . . . . . 4, *passim*

Railway Express Agency v. New York,
336 U.S. 106,112-113 (1949) 6

United States v. Eichman,
496 U.S. 310, 317-18 (1990) 4

United States v. W. T. Grant Co.,
345 U.S. 629,632-633 (1953) 6

CONSTITUTION AND STATUTES

U.S. Const. Amend. I . . . . . 1, *passim*

28 U.S.C. § 1257(3) 2

No. 95 -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

REVEREND WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI,

Petitioners,

v.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

DECISIONS BELOW

By Order to Show Cause and Complaint, the Respondents commenced an action in the Superior Court of New Jersey, Chancery Division, Bergen County on July 13, 1989 seeking injunctive relief against all First Amendment activity on the sidewalk in front of their place of business. The Chancery Division issued an Order to Show Cause with Temporary Restraints on July 13, 1989 and an Interlocutory Injunction on August 8, 1989, all on an *ex parte* basis.

Petitioners intervened in the action on December 1, 1989 to contest the validity of the injunction. After trial in December 1991, the Chancery Division issued an opinion on February 19, 1992, which was embodied in an order on March 27, 1992.

An appeal was taken by Petitioners. On July 1, 1993, the New Jersey Appellate Division affirmed. Petitioners then filed a Petition for Certification in the New Jersey Supreme Court, which granted certification on April 7, 1994 and summarily remanded the matter to the Chancery Division for reconsideration.

On remand, the Chancery Division issued a supplemental opinion on March 14, 1995 and issued an order on April 7, 1995 which retained all provisions of the earlier order. Petitioners again appealed to the New Jersey Appellate Division. On April 25, 1996, the Appellate Division issued an opinion which affirmed in part and reversed in part, and remanded the matter to the Chancery Division for entry of an order consistent therewith. The modified order was entered on June 25, 1996.

Petitioners filed another petition for certification in the New Jersey Supreme Court, and Respondents filed a cross-petition. Both the petitions were denied September 25, 1996.

JURISDICTION

This Court has jurisdiction, under 28 U.S.C. Section 1257 (3) to review the final judgment of the highest court of a State "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . ." The jurisdiction of the New Jersey Supreme Court was properly invoked and it declined to review the judgment of the Appellate Division.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution Amendment I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ".

STATEMENT OF THE CASE

In this case the Supreme Court of New Jersey has permitted an injunction which (*inter alia*) forbids peaceful picketing, leafleting, and conversation by Petitioners on public sidewalks and rights of way. There was a specific finding by the trial court that the Petitioners have not engaged in any behavior which is unlawful or otherwise prohibited. Moreover, there was no finding that the Petitioners contemplated any future behavior which is unlawful or otherwise prohibited. The very foundation of the First Amendment is severely damaged by this decision.

This is *not* a "rescue" case. There were no pro-life sit-ins or blockades at the plaintiff abortion facilities before the order to show cause with temporary restraints was issued. There was no finding that the Petitioners ever engaged in any illegal activity. On the contrary, the Chancery Division stated in its opinion:

> The named defendants will be bound by the injunction in the same manner as others having notice of the restraints. *They were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints.* (Emphasis supplied)

The principal question in this case is whether the New

Jersey Supreme Court erred by suspending the Petitioners' right to engage in speech on public sidewalks and streets.

As a matter of evidence and constitutional law, the answer is clear. The injunction unconstitutionally restricts and discriminates against Petitioners' free speech rights. Furthermore, the injunction is in direct violation of the principles set forth in this Court's *Madsen* decision.

This Court should grant this petition for certiorari and correct this manifest attack on the core of the First Amendment: the protection of disfavored speech in the traditional public forum of public sidewalks and streets.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

The most important reason to grant this petition is to restrain the manifestly improper application of the *Madsen decision*. Without correction by this Court, the free speech rights of persons who "were not shown to have engaged in . . . unlawful . . . acts nor to have violated . . . preliminary restraints . . . ." will be severely curtailed.

STAGE AT WHICH, AND MANNER IN WHICH, FEDERAL QUESTIONS WERE RAISED BELOW

The federal questions raised here were first raised by

Petitioners at the time of trial. Petitioners presented six witnesses, in addition to themselves, during the course of the trial which took place in December 1991. All agreed that the conduct of Petitioners has been exemplary. The Petitioners have been so considerate and well behaved that three former patients of respondent came forward, without compulsion, to testify on behalf of Petitioners. Each testified that the sidewalk counselors outside the premises were calm, quiet and peaceful, and that they had been treated courteously by the Petitioners.

The absence of the required showing of illegality and the excessiveness of the injunction were raised at summation on December 4, 1991, in the brief filed with the Appellate Division on September 17, 1992, at oral argument before the Appellate Division on May 25, 1993, in the petition for certification filed with the New Jersey Supreme Court on July 28, 1993, in five supplemental briefs filed with the Chancery Division on May 26, 1994, June 2, 1994, August 25, 1994, December 2, 1994 and December 9, 1994. They were also raised in the brief filed with the Appellate Division on September 30, 1995 and the petition for certification filed with the New Jersey Supreme Court on May 28, 1996.

ARGUMENT

I. The State Court has Decided Two Federal Questions of Constitutional Importance In A Manner Inconsistent With Applicable Decisions of This Court

This petition for a writ of certiorari presents significant and compelling constitutional issues. In *Madsen*, this Court required precision of regulation by courts in issuing injunctions which burden speech. In determining the standard to apply to injunctions against protected First

Amendment conduct, the Court in *Madsen* examined the differences between an injunction and a generally applicable ordinance. Those differences were set forth as follows:

> There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunction, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. (See United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953).) Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. "[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (Railway Express Agency, Inc. V. New York, 336 U.S. 106, 112-113 (1949).)

The Court held "that these differences require a somewhat more stringent application of general First Amendment principles in this context." *Madsen*. In other words, injunctions are to be more closely scrutinized than generally applicable ordinances. "Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than

necessary to serve a significant government interest." Since this Court sets forth a stricter test than that previously applied by the highest court of New Jersey, the injunction at issue here must meet that standard.

A. THE *MADSEN* CASE PROHIBITS THE NEW JERSEY COURTS FROM ENJOINING FREE SPEECH WITHOUT SHOWING THAT THOSE ENJOINED HAVE VIOLATED OR WILL VIOLATE APPLICABLE LAW

In *Madsen*, this Court stated that injunctions "are remedies imposed for violations (or threatened violations) of a legislative or judicial decree." This Court continued "[A]n injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'"

In *Madsen*, this Court explained that "[t]he state Court imposed restrictions on petitioners incidental to their anti-abortion message because they repeatedly violated the Court's original order." This Court also noted "[t]he failure of the first injunction to protect access," the fact that "petitioners themselves studiously refrained from challenging the factual basis for the injunction," and "for purposes of this appeal [petitioners] are assuming *arguendo* that a factual basis exists to grant injunctive relief."

The context is far different in the within matter. The Chancery Division specifically found, after more than two years of discovery and three days of trial, that the Petitioners "were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints." Accordingly,

Madsen prohibits any injunction against these Petitioners, who have not "violated, or imminently will violate, some provision of statutory or common law."

B. THE INJUNCTION HEREIN, BY RESTRICTING THE SPEECH OF INNOCENT PARTIES, BURDENS MORE SPEECH THAN NECESSARY TO SERVE A SIGNIFICANT GOVERNMENT INTEREST.

The decision in *Madsen* requires "the injunction burden no more speech than necessary to serve a significant government interest." This Court held that a 36 foot buffer zone was necessary because of "the failure of the first order to accomplish its purpose," and found that the petitioners "repeatedly violated the Court's original order."

None of these circumstances are present here. The Chancery Division found that the Petitioners engaged in no illegal activity, and never violated any provision of the preliminary restraints. None of the four named defendants or six witnesses observed any such acts or violations. The Respondent admitted that it could not identify any specific individual who had complained about Petitioners, and that no patients had ever expressed a desire to participate in the case on behalf of the Respondent. On the contrary, three of Respondent's former patients were so impressed by the Petitioners' exemplary conduct that they asked to testify on Petitioners' behalf.

The New Jersey courts have never identified any significant government interest which would be served by prohibiting Rev. Robokoff, Ms. Bates, Ms. Sterlace-Accorsi and Mr. Natiello from using a public sidewalk. On the contrary, the trial court specifically found that the Petitioners

are innocent of any wrongdoing. They are being persecuted and deprived of their right of free speech merely because they are pro-life. It should be obvious that the New Jersey courts are burdening "more speech than necessary to serve a significant government interest."

The New Jersey Appellate Division dismissed this argument in their opinion dated April 25, 1996, saying:

> "we believe that Judge Lesemann acted correctly and reasonably in enjoining defendants-appellants. He concluded that it would be unfair and unworkable for purposes of the injunction to create two classes of demonstrators, based upon distinguishing those identified as having engaged in the harassing and disruptive conduct from those who were not known to have done so."

This reasoning fails to measure up to the *Madsen* standard for two reasons. First, the New Jersey court has decided to ignore the Constitutional rights of the Petitioners merely because the protection of those rights would be "unfair and unworkable." Second, the court ignores the fact that no "demonstrator" was ever "identified as having engaged in the harassing and disruptive conduct."

CONCLUSION

The highest court of New Jersey has declined to vacate an injunction which impairs one of the most precious rights, privileges and immunities provided by the Constitution. Its decision is inconsistent with applicable decisions of this Court. The State of New Jersey has deprived the Petitioners

of their rights under the United States Constitution Amendment I without the required showing that Petitioners have violated or imminently will violate, some provision of statutory or common law. The State has burdened more speech than necessary to serve a significant government interest. The Petitioners respectfully request this Court to grant this Petition and correct the manifest injustice caused by the State of New Jersey.

A-1

FILED
WITH THE COURT

JUL 13 1989

ARTHUR J. LESEMANN
J.S.C.

CERESTE & ROCCA
1624 CENTER AVENUE
P.O. BOX 845
FORT LEE, NEW JERSEY 07024
(201) 944-4213
ATTORNEY FOR PLAINTIFF

WOMEN'S CHOICE OF BERGEN COUNTY, P.A. A PROFESSIONAL SERVICE CORPORATION OF NEW JERSEY	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO. C-4053-89-E
vs.	CIVIL ACTION
JOHN DOE AND OTHER UNKNOWN AND UNIDENTIFIED PERSONS AND ORGANIZATIONS	ORDER TO SHOW CAUSE (WITH TEMPORARY RESTRAINTS)

This matter having been opened to the Court by Glenn M. Rocca, Esq., of the firm Cereste & Rocca, Esqs., Attorney's for the Plaintiff and the Court having considered

the Verified Complaint and the Affidavit and Brief submitted in Support of the Order to Show Cause, and the Court having found that immediate and irreparable dame will occur to the Plaintiff unless certain relief is granted and good cause being shown;

IT IS on this 13 day of July, 18, 1989;

ORDERED that the Defendants show cause before the Superior Court of New Jersey, Chancery Division, Bergen County at 9:00 o'clock A.M. on July 27, 1989, at the Bergen County Court House, Hackensack, New Jersey, why an Injunctive Order should not be issued restraining and enjoining the Defendants according to the relief sought in the Complaint or until further order of the Court; and it is

FURTHER ORDERED that pending the aforesaid return date, the Defendants and all persons or organization acting in concert or combination with the named Defendants, be and the same hereby are enjoined and restrained from entering upon the property of Women's Choice of Bergen County, 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises and shall not obstruct vehicular or pedestrian access to the property; and, it is

FURTHER ORDERED that the aforementioned Defendants are enjoined and restrained from disrupting, intimidating or harassing persons frequenting the premises of the Plaintiff and Plaintiff's employees and staff; and, it is

FURTHER ORDERED that the aforementioned Defendants are enjoined and restrained from making and shouting verbal communications, of the nature of but not limited to statements such as "Murderers", "Baby Killers" and other similar statements, and form using any mechanical amplification device for verbal communications; and, it is

FURTHER ORDERED that on the northerly side of Zabriskie Street, the Defendants may picket or patrol only at

a distance of not less than 25 feet west of the Zabriskie Street entrance to Plaintiff's place of business, or east of the easternmost part of the parking lot serving Plaintiff's place of business; and it is

FURTHER ORDERED that a copy of the within order to show cause, complaint, Affidavit of Ted R. Weiselberg dated July 10, 1989, and Brief in Support of the within application shall be served upon the Defendants by distributing and disseminating to any demonstrators or picketers who may be present at or near the offices of the Plaintiff on July 12, 13, 14 and 15, 1989 and to any other extent reasonable to notify any other picketers on any other days; and, it is

FURTHER ORDERED that the Hackensack Police Department shall assist in the distribution of copies of this order and enforcement of this order; and it is

FURTHER ORDERED that all answering papers shall be filed with this Court and served upon Plaintiff's counsel no later than July 19, 1989 and that Plaintiff's Reply to Defendants papers, if any, is to be filed no later than July 24, 1989; and it is

FURTHER ORDERED that the Defendants, and each of them, may move for a dissolution or modification of the Restraints hereby imposed on two days notice in accordance with R. 4:52-1 (a); and, it is

FURTHER ORDERED that the aforesaid Defendants, and each of them, shall file and serve their Answer to the Complaint within 20 days of service of the within Order to Show Cause, Complaint, Certification and Brief upon Cereste & Rocca, 1624 Center Avenue, P.O. Box 845, Fort Lee, New Jersey 07024, and that failure by the Defendants, or any of them to file an Answer as aforesaid shall entitle Plaintiff to the entry of a Judgment by Default against such Defendant for the relief demanded in the Complaint. In addition,

Defendants shall promptly file their Answer and Proof of Service in duplicate with the Clerk of the Superior Court, CN-971, Trenton, New Jersey 08625, in accordance with the Rules of Civil Practice and Procedures. An individual who is unable to obtain an Attorney may communicate with the New Jersey State Bar Association by calling toll free 1-800-792-8315 (within New Jersey) or 1-609-394-1101 (from outside the State). You may also communicate with the Lawyers Referral Service 201-488-0044 or, if cannot afford to pay an Attorney, communicate with the Legal Services office 201-487-2166; and, it is

FURTHER ORDERED that a copy of the within order shall be served upon the Police Chief of the City of Hackensack so that the within Order and Temporary Restraints will be implemented and enforced.

ARTHUR J. LESEMANN J.S.C.

WITH THE COURT

AUG 8 1989

ARTHUR J. LESEMANN
J.S.C.

CERESTE & ROCCA
1624 CENTER AVENUE
P.O. BOX 845
FORT LEE, NEW JERSEY 07024
(201) 944-4213
ATTORNEY FOR PLAINTIFF

	: SUPERIOR COURT OF
WOMEN'S CHOICE OF	: NEW JERSEY
BERGEN COUNTY, P.A.	: CHANCERY DIVISION
A PROFESSIONAL	: BERGEN COUNTY
SERVICE CORPORATION	:
OF NEW JERSEY	: DOCKET NO. C-4053-89-E
	:
vs.	: CIVIL ACTION
	:
JOHN DOE AND	: INTERLOCUTORY
OTHER UNKNOWN AND	: INJUNCTION
UNIDENTIFIED	:
PERSONS AND	:
ORGANIZATIONS	:
	:
	:

This matter having been opened to the Court by Glenn M. Rocca, Esq., of the firm Cereste & Rocca, Esqs., Attorney's for the Plaintiff, and the Court having considered

the Proofs submitted by the Plaintiff on July 27, 1989, and the Court having found that irreparable damage will occur to the Plaintiff unless a interlocutory injunction is granted and good cause being shown;

IT IS on the 8th day of August of 1989;

ORDERED that the Defendants and all persons or organizations acting in concert or combination with the named Defendants, be and the same are hereby enjoined and restrained from entering upon the property of Women's Choice of Bergen County, 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises and shall not obstruct vehicular or pedestrian access to the property; and, it is

FURTHER ORDERED that the aforementioned Defendants are hereby enjoined and restrained from disrupting, intimidating or harassing persons frequenting the premises of the Plaintiff and Plaintiff's employees and staff; and, it is

FURTHER ORDERED that the aforementioned Defendants are hereby enjoined and restrained from making and shouting verbal communications, of the nature of but not limited to statements such as "Murderers", "Baby Killers' and other similar statements, and from using any mechanical amplification device for verbal communications; and, it is

FURTHER ORDERED that on the northerly side of Zabriskie Street, the Defendants may picket or patrol only at a distance of not less than 25 feet west of the Zabriskie Street entrance to Plaintiff's place of business, or east of the easternmost part of the parking lot serving Plaintiff's place of business; and, it is

FURTHER ORDERED that a copy of the within Order shall be served upon the Police Chief of the City of Hackensack so that the within Order and injunction will be implemented and enforced; and, it is

FURTHER ORDERED that a copy of the within interlocutory injunction shall be served upon the Defendants by distributing and disseminating the same to any demonstrators or picketers who may be present at or near the property of the Plaintiff; and, it is

FURTHER ORDERED that the publication notice, which is annexed hereto and made a part hereof, be published in The Record on one occasion, within 20 days of the date hereof; and, it is

FURTHER ORDERED that the Defendants are to file an Answer to Plaintiff's Complaint within 35 days of the date of publication of the notice; and, it is

FURTHER ORDERED that if Defendants fail to do so, this matter shall be listed for final hearing 30 days after the time expires for the Defendants to file their Answer as stated above; and, it is

FURTHER ORDERED that a status conference is listed for October 19, 1989 at 2:00 P.M.

ARTHUR J. LESEMANN, J.S.C.

NOTICE OF ACTION

TO: John Doe and other unknown and unidentified persons and organizers picketing the premises known as the Women's Choice of Bergen County, 10 Zabriskie Street, Hackensack, New Jersey.

TAKE NOTICE THAT the Plaintiff, Women's Choice of Bergen County, P.A., A Professional Service Corporation of New Jersey, has instituted an action in the Superior Court of New Jersey, Chancery Division, Bergen County, known as Docket No. C-4053-89E against the above named unknown Defendants seeking to permanently enjoin and restrain the Defendants from entering upon the property of the Plaintiff; from making and shouting verbal communications to patients, employees and staff; and not to limit pickets of patrols on the northerly side of Zabriskie Street to location not less than twenty-five feet west of the Zabriskie Street entrance to Plaintiff's place of business, which is located on the northerly side of Zabriskie Street, or east of the eastern most part of the parking lot serving Plaintiff's place of business.

The Defendants and all persons or organization acting in concert or combination with the named Defendants, shall file and serve their Answer to the Complaint filed by Plaintiff within 35 days of publication or the within notice upon the firm of Cereste & Rocca, 1624 Center Avenue, P.O. Box 845, Fort Lee, New Jersey 07024, Attn: Glenn M. Rocca, Esq., and that failure by the Defendants or any of them, to file an Answer as aforesaid shall entitle the Plaintiff to an entry of Judgment by Default against the Defendants for the relief demanded in the Complaint. In addition, Defendants shall promptly file their Answer and Proof of Service in

duplicate with the Clerk of the Superior Court, CN 971, Trenton, New Jersey 08625, in accordance with the Rules of Civil Practice and procedure. An individual who is unable to obtain an Attorney may communicate with the New Jersey State Bar Association by calling toll free 1-800-792-8315 (within New Jersey) or 1-609-394-1101 (from outside the state). You may also communicate with the Lawyers Referral Service 201-488-0044 or, if you cannot afford to pay an Attorney, communicate with the Legal Services Office 201-487-2166.

GLENN M. ROCCA
Attorney for Plaintiff
CERESTE & ROCCA
1624 Center Avenue
P.O. Box 845
Fort Lee, New Jersey 07024

NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE
COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:BERGEN COUNTY
DOCKET NO. C-4053-89E

Women's Choice of Bergen County, P.A., a Professional Service Corporation of New Jersey,

Plaintiff,

vs.

OPINION

John Doe and Other Unknown and Unidentified Persons and Organizations Including but not Limited to Walter J. Robokoff, Kathleen Bates, Steven Natiello and Michele Sterlace-Accorsi,

Defendants.

Decided: February 19, 1992

SAVERIO V. CERESTE, for plaintiff

KEITH E. PATERSON, for defendants

ARTHUR J. LESEMANN, J.S.C.

Plaintiff here seeks a permanent injunction limiting anti-abortion demonstrators at the clinic it operates in Hackensack. Defendants claim the relief sought infringes upon their constitutional rights of free speech. The conflict thus present another in a series of cases calling upon courts to reconcile the exercise of competing rights in the emotional context of anti-abortions demonstrations.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Women's Choice of Bergen County operates a gynecological and obstetrical clinic in Hackensack. As part of those services, it performs abortions three days a week.

Since its inception 11 years ago, the clinic has encountered periodic picketing and related demonstrations. Until the events described below, those demonstrations usually involved two or three participants, peacefully picketing, and the disruptive effect on plaintiff's operations was minimal.

Beginning around 1989, the demonstrations gradually became more intense, until they reached their peak and changed significantly on Saturday, July 1 and Saturday, July 8, 1989. As described in the essentially uncontradicted testimony of plaintiff's witnesses, the demonstrations on those days were most decidedly disruptive.

On July 1, 25 to 30 people gathered in front of the clinic. They blocked entry to plaintiff's driveway. They entered the driveway and plaintiff's parking lot. They barred entry through the main door of the building by having four or five people stand in front of the door, making passage impossible.

The demonstrators shouted at plaintiff's staff, calling the, among other things, "murderers" and "baby killers."

They also shouted at patients trying to enter the clinic. They told the patients not to go in, that the building was a "killing factory," and those within would "rip your baby apart." They thrust literature upon them -- much of which was introduced in evidence and most of which portrays abortion as an ugly, violent crime. They also thrust upon the patients small plastic fetuses, representative of the babies they said were being destroyed.

The police were called, and came. They cleared the physical obstruction of the front door, but said they could do little else without a court order.

The effect on plaintiff's operations and the condition of the patients was devastating.

Instead of using the normal front door leading into a waiting room, plaintiff was required to have its patients enter through an emergency fire-exit door, opening directly into the parking lot. That brought the patients into interior, private office areas, disrupting employees attempting to perform their jobs.

Theodore Weiselberg, plaintiff's administrative director and Christine Weiselberg, director of nursing, described the condition of the patients themselves in graphic detail.

Both noted that patients arriving for a scheduled abortion are frequently nervous and emotionally upset to begin with. As a result of what they had to pass through to gain entry to the Women's Choice facility those conditions were exacerbated, often to the point where the scheduled abortion could not proceed.

The patients were often hysterical. Many were sobbing and most were frightened. Some vomited and most were unable to go ahead with their scheduled procedure without a wait of several hours.

Normally, a patient stays in plaintiff's facility for two

to two and one-half hours. On this day, if the procedure were performed at all, it took five to six hours.

Almost all patients had elevated pulse and elevated blood pressure. Because they had been crying, their sinus cavities had excess mucus, and all of those conditions had to be alleviated before anesthesia could be administered. That required time and, in some cases, medication to dry the sinus cavities. Many did not have the procedure performed at all.

In all, approximately 50% of plaintiff's scheduled patients cancelled their appointment on July 1. Many called to say they had seen the demonstrators and decided not to come. Others did not call at all. Since Women's Choice performs abortions only during the first trimester of pregnancy, some never returned to plaintiff's facility, and if they had an abortion performed at all, it was done elsewhere.

One week later, on Saturday, July 8, 1989, approximately the same number of demonstrators reappeared. The events of that day were almost a carbon copy of a week earlier. The activities were essentially the same. The effect of plaintiff's patients and plaintiff's operations was, again, devastating. Plaintiff's witnesses described the building as being "under siege," and that description does not seem exaggerated. Confrontations between demonstrators and patients were direct -- often fact to face and inches apart. There was much screaming and name-calling but, fortunately, no physical fights. Mr. Weiselberg described the events of the day as "horrifying and non-stop."

Five days after the July 8, 1989 events, plaintiff sought a temporary restraining order against such demonstrations. The moving papers said that defendant could not identify those who had demonstrated on July 1 and July 8, and they sought relief against "John Doe and other unknown and unidentified persons and organizations." No one appeared on behalf of those unnamed defendants, and an

order to show cause returnable July 27, 1989, was issued. The order to show cause contained a temporary restraining order designed to protect plaintiff against unreasonable and unlawful interference with its operations. It also recognized and sought to accommodate the protestors' constitutional right to demonstrate peacefully, consistent with plaintiff's right to conduct its business and consistent with its patients' rights to use plaintiff's services.

An understanding of the scope and limits of the temporary restraining order requires a brief description of plaintiff's premises and the surrounding neighborhood.

The building is located in Hackensack on the northeast corner of Main Street (which runs north-south) and Zabriskie Street (which runs east-west). it is a one-floor, multi-tenant structure, with plaintiff's clinic located on the east end.

There is a parking lot east of the building, with a driveway entrance onto Zabriskie Street. The main entrance to plaintiff's suite is on Zabriskie Street, approximately 15 feet west of the parking lot. From that door, the distance west to Main Street is approximately 100 feet. As noted above, there is a door directly from plaintiff's offices to the parking lot, but that door is normally limited to use as an emergency fire exit.

The temporary restraining order did not prohibit, but did limit, demonstrations at the site. It required demonstrators either to remain on the south side of Zabriskie Street (across the street from plaintiff's premises) or, if they wished to demonstrate on the north side of Zabriskie Street, to do so only east of the parking lot or at least 25 west of the main entry to the clinic.

Plaintiff's counsel was also instructed to provide copies of the order to pickets who might appear there-after and to disseminate as broadly as possible the fact that the court would hear plaintiff's application for an interlocutory

injunction on July 27, 1989.

The matter was heard again on July 27, but there was still no appearance on behalf of the unidentified defendants. Plaintiff's counsel advised that there had been picketing and demonstrators had complied with the limitations imposed. Counsel also said that, for notice purposes, plaintiff's representatives had made several attempts to obtain the names or other identification of the demonstrators but had been unsuccessful.

After further review and colloquy, an interlocutory injunctive order was entered containing the same restrictions as those in the temporary restraining order. Counsel was directed to continue disseminating the order to demonstrators and also to publish it in the newspaper. And a procedure was outlined to move the matter toward a final hearing.

In November, 1989, five individuals filed a motion to intervene and a document entitled "Answer of Intervening Defendants." Three others joined them shortly thereafter, and an answer on behalf of all the named individuals, as well as the "John Doe" defendants, was filed by Keith E. Paterson, Esq., who undertook defense of the matter on behalf of all defendants.

The five original intervenors denied having been at the premises on either July 1 or July 8, 1989. However, they claimed an interest in the matter because they do sometimes demonstrate at abortion clinics and opposed any attempt to limit their right to do so at the Women's Choice clinic. The three other named defendants seemed to assert essentially the same position, although there is some question as to whether they, or some of them, may have been present on July 1 or July 8.

The court permitted intervention, and indeed, welcomed it as an opportunity to insure that a position opposed to plaintiff's would be submitted and argued, thus

reducing the chance of an unintentional or unnecessary limitation of important constitutional rights of free speech.

The case the proceeded as a plenary matter. So far as then appeared, the interlocutory injunction worked well.[1] There was no motion on either side to modify the terms of the restraint, nor, until shortly before the date set for final hearing, was there a complaint by plaintiff asserting noncompliance with the court ordered restraints.

At the recently completed final hearing, however, plaintiff contended that there has been an increasingly frequent pattern of violation of the injunction, and also a developing pattern of conduct which circumvents its restrictions. Plaintiff asked the court to broaden the restraints imposed. Defendants sought vacation of the restraints.

Plaintiff's trial testimony was essentially undisputed. While a number of witnesses testified for the defense, most described their own conduct as unobtrusive and not partaking of the improper activities described by plaintiff. None, however, really denied that there were frequent violations or that the pattern described by plaintiff's witnesses was accurate. Rather the thrust of their testimony, generally, was that if those actions had taken place, someone else had done it.

Mr. Weiselberg testified that the interlocutory order had been violated frequently -- usually by demonstrators coming within the proscribed area on the northern side of Zabriskie Street, often close or in front of plaintiff's door. Plaintiff, he said, had been required to call the Hackensack Police approximately 50 times, and the police had come on 30

Largely for that reason, the matter proceeded without the expedited treatment which would otherwise have been given to a matter of this kind, involving, as it does, important matters of public interest.

or 35 occasions. Almost invariably, when the police came, they demanded compliance with the interlocutory injunction and the demonstrators obeyed. Again, almost invariably however, when the police left, the violations resumed.

The Weiselbergs also described a pattern by which the demonstrators encircled and swooped down on patients as they approached the entry to plaintiff's premises. When they saw a patient park her car or start toward the door, demonstrators often left their positions on the south sidewalk, and converged on the patient, thrusting literature at her and also at anyone accompanying her. Thus there was no way that a patient could park a car and walk into plaintiff's front door without directly confronting and walking through a group of demonstrators.

This problem was exacerbated, Mr. Weiselberg said, by a change in plaintiff's parking facilities. When the interlocutory injunction was entered, the theory was that patients could park in the parking lot and then walk from the lot onto the northern sidewalk and into the front door. However, since 1989 new tenants have moved into the building which plaintiff occupies, and there has also been a new tenant in the building east of the parking lot, which shares use of that lot. The result has been that there are only five spaces in the lot available for plaintiff's patients, and thus, most patients are required to park on the street.

Mr. Weiselberg also described what he called the inevitable pattern of confrontation as demonstrators faced patients. He said that no matter how a dialogue might begin, it almost always degenerated into shouting and face-to-face confrontations. Frequently, male escorts of the patients came close to blows with the demonstrators. Literature was offered to patients, but if they declined it, the literature was frequently thrown at them, or at their feet or on their car. Often, the sidewalks and the parking lot were virtually

covered with such literature.

Plaintiff asked that the existing restrictions be modified. It asked that demonstrating and picketing be prohibited on the north side of Zabriskie Street, within an area bounded ont he east by the easterly end of the parking lot and on the west by Main Street. In that way, Mr. Weiselberg said, patients could park their cars on or near Main Street, and then walk on the northerly sidewalk along Zabriskie Street and enter plaintiff's offices without being required to walk through confronting demonstrators and pickets. The protestors would remain free to demonstrate on the southerly side of Zabriskie Street (about forty feet away) and also on the north side, east of the parking lot, but the fact to face ugliness and confrontations would be eliminated.

II. THE GOVERNING LAW AND ITS APPLICATION TO THIS CASE

There is no question that plaintiff's business is a lawful one, Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). And see, Right to Choose v. Byrne, 91 N.J. 287 (1982); Planned Parenthood of Monmouth County v. Cannizzara, 204 N.J. Super. 531 (Ch. Div. 1985), aff'd on opinion below, 217 N.J. super. 623 (App. Div. 1987). Accordingly, there is also no question that plaintiff has the right to conduct that business free of unlawful interference.[2]

Plaintiff's patients also have rights (rights to avail themselves of plaintiff's services) that are affected by the demonstrators actions. See, Roe v. Wade and the other cases cited, supra. And while the question had not been argued or even raised here, it also seems clear that plaintiff has standing to assert and attempt to protect those rights of its patients.

Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989); U.S. Pipe & Foundry Co. v. United Steelworkers of America, 59 N.J. Super. 240 (App. Div. 1960).

As described above, and as discussed further below, it is also clear that the actions of the demonstrators here have interfered with those rights of plaintiff and its patients. Their actions constituted trespass (by going within plaintiff's parking lot) and coercion by blocking entry to plaintiff's parking lot and building. And the coercion consisted of both physical acts -- blocking driveways and doorways -- and intimidation by confrontation, screaming, thrusting of literature on plaintiff's patients and the other acts described above. Clearly, plaintiff is entitled to relief to enable it once again to operate its lawful business free from such conduct. See, U.S. Pipe & Foundry Co., 59 N.J. Super. at 252-254 (dealing with labor picketing but with a coercive pattern comparable to that here, where the court noted that otherwise lawful picketing and demonstrating must be "free form intimidation, coercion, duress fraud and force"); Planned Parenthood of Monmouth County v. Cannizzzaro, 204 N.J. Super. at 543, describing the actions of anti-abortion demonstrators there as "intimidating and harassing" and granting injunctive relief; Northeast Women's Center v. McMonagle, 745 F. Supp. 1082, 1090 (E.D. Pa 1990) (commenting that the right to protest against abortion does not "provide defendants with an unfettered right to trespass on plaintiff's private property, or to harass, intimidate and

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Cases which have considered the point generally hold that a clinic operator does have right to assert and protect the interests of its patients. See, e.g., Planned Parenthood of Monmouth County v. Cannizzaro, 2024 N.J. Super. at 536. See also, New York State Nat. Org. for Women v. Terry, 886 F.2d 1339, 134601347 (2d Cir. 1989), and cases there cited.

assault its patients and staff").[3]

It is equally clear, however, that providing such relief

While this court can deal with plaintiff's request for injunctive relief on the uncomplicated and undisputed premise that plaintiff had a common law right to conduct a lawful business free from unlawful interference, federal courts dealing with these issues have a more complex threshold questions. As courts of defined and limited jurisdiction, they must first find they have jurisdiction before they can afford relief. In most cases, discussion of the jurisdictional issue focuses on 42 U.S.C.A. 1985 (3), an 1872 statute often referred to as the Ku Klux Klan Act, which deals with conspiracies to deprive any "person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The statute has been interpreted to require "some racial, or perhaps otherwise class-based invidiously discriminated animus" behind the conspirators' action. Not all "classes of person fall within" the statute and the debate usually focuses on (1) whether women are a "protected class" within the meaning of ****1985 (3); and (2) whether the action complained of partakes of the requisite "class-based animus". If those questions are answered in the affirmative a court seeking to apply ****1985 (3) must still find an infringement of a constitutional right -- often claimed to be the constitutional right of interstate travel. For an incisive discussion of these issues, see, New York State Nat. Org. for Women v. Terry, 886 F. 2d 1339, 1357-1361 (2d Cir. 1989). See also, Lucera v. Operation Rescue of Birmingham, ___ F. 2d ___ (11th Cir. 1992) where the majority's finding that violent anti-abortion activities were not "motivated by a gender-based animus" was characterized by the dissent as bringing "abstraction to a new level of absurdity." ___ F. 2d at ___.

by imposing limitations on the actions of the protestors will inevitable raise important constitutional issues that inhere in any attempt to limit First Amendment rights of free speech.

Such conflicts are not novel. They have arisen frequently, in different contexts, and in resolving them, the United States Supreme Court (as well as other courts dealing with the issue) have evolved a number of principles which are by now well-settled.

First, it is clear that First Amendment rights of free speech are not absolute. Those who

> wish to propagandize protests or views [do not] have a constitutional right to do so whenever, however, and wherever they please. United States v. Grace, 461 U.S. 171, 177-78, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

And see, e.g., New York State Nat. Org. for Women v. Terry, supra 886 F. 2d at 1363.

> (T)he First Amendment may not be read to protect a person's right to express their views at any time, in any manner, and in any place of their choosing.

Thus, free speech activities are subject to "reasonable time, place, and manner restrictions." And in determining whether particular restrictions are indeed "reasonable," they are required to pass a three-pronged test. They must

(1) Be content-neutral;

(2) Be narrowly tailored to meet a significant government interest; and

(3) Leave open ample alternative means of communication.

See, e.g., among the many cases citing and applying these criteria, New York State Nat. Org. for Women v. Terry, 886 F 2d at 1363; Portland Feminist Women's Health Center v. Advocates for Life, 859 F. 2d 681, 686 (9th Cir. 1988); Northeast Women's Center v. McMonagle, 745 F. Supp. 1082, 1088 (E.D. Pa 1990).

In applying those principles here, we begin with the acknowledgment that plaintiff does not seek to bar all demonstrations and protests. Rather, as required by the principles just cited, the attempt is to impose "reasonable time, place and manner" restrictions on those activities. Accordingly, to test and evaluate those proposed restrictions, we turn to the three-pronged test referred to above.

The first prong of that test -- "content neutrality" is not an issue here. Except in one limited aspect discussed below, there is no attempt to limit or govern what is said. Rather, the request is to limit the manner, the place, and (to some extent) the time when and how the statements are made.

The second aspect of the three-part test asks whether the proposed restrictions is narrowly drawn to meet a compelling government interest. That there is a governmental interest in plaintiff's ability to operate its clinic and its patients' ability to use that clinic, is clear. As noted above, the business is a lawful one; plaintiff has a right to operate if and the patients have a right to use it. And in addition, the state has a legitimate interest in seeing that patients' interests are met and satisfied without unlawful health-threatening

complications. In the context of the test being applied, those government interests have been consistently found sufficient to satisfy that aspect of the second prong of the test. See, e.g., Portland Feminist Women's Health Center v. Advocates for Life, 859 F. 2d 681, 686 (9th Cir. 1988); Northeast Women's Center v. McMonagle, (745 F. Supp.) 1082, 1089-1090 (E.D. Pa. 1990). See also, New York State Nat. Org. for Women v. Terry, 886 F. 2d at 1364 (noting the governmental interest in preserving public safety while demonstrations take place).

The real issues in this case are whether the proposed limits are "carefully drawn" and kept to the minimum necessary to protect plaintiff's rights (the remaining portion of the second part of the three-prong test) and whether defendants are left with adequate alternate means of communication -- the third prong of the test. Those interrelated questions can best be discussed together in the context of the limitations proposed by plaintiff.

A. Limitations on Picketing and Demonstrating.

An analysis of whether plaintiff merits and needs the restrictions it seeks requires an assessment and appraisal of the protestors' actions here.

There is no question that those actions went far beyond mere speech. The protestors blocked the entrance to plaintiff's clinic. They intimidated plaintiff's patients by confronting them face to face -- often inches apart. They made it difficult and often impossible for them to move freely from their cars to the entrance to plaintiff's building. They did not merely offer information or opinion; they thrust their opinions at their targets forcefully, often physically and obtrusively. The conclusion is inescapable that they did more than seek to persuade. They sought to obstruct plaintiff's

operations - and to a considerable extent, they succeeded. With approximately one-half of plaintiff's patients cancelling their visits on July 8, 1989, and other having their conditions exacerbated and their medical needs complicated, the effect on plaintiff and on plaintiff's patients was significant and serious.

The need and justification for the restraining order and interlocutory injunction are clear. The evidence that those orders were necessary for plaintiff's continued operation, and that they ameliorated the crisis of July, 1989, is clear, convincing, and undisputed.

Also clear and convincing, and virtually undisputed, is the additional testimony that as time went on, the restrictions embodied in the two preliminary orders became less effective. Violations became more frequent, and the change of tactics by the protestors -- swarming toward prospective patients as they approached the clinic -- undercut the effectiveness of the "free zone" around plaintiff's front door that had been created by the earlier orders. That emasculation of the effective features of the preliminary orders led plaintiff to seek a somewhat larger "free zone" in the permanent injunction it seeks. That modification is clearly warranted.

The creation of a "free zone" -- free of demonstrators, where patients visiting an abortion clinic may gain entry without ugly, disruptive, face-to-face confrontation -- is a device that has been used by a number of courts performing the balancing operations required in a case like this. And such "free zones" have included public area such as sidewalks where demonstrators normally would be permitted.

Thus, in Portland Feminist Women's Health Center v. Advocates for Life, the district court prohibited "demonstrating or distributing literature" on the sidewalk in front of plaintiff's building. The proscribed area was

described as a "rectangular zone... from the front door to the curb and twelve and one-half feet on either side of a line from the middle of the ... door to the curb." (859 F. 2d at p. 684). The Ninth Circuit Court of Appeals described the "free zone" as "tailored to address threats, intimidation, and assault on clinic personnel and clients that impede the safe provision of medical care." While it felt that the trial court "could possibly achieve its goal with a narrower free zone," it also declined to "entertain quibbling over a few feet" and it affirmed the district court action.

Similarly, in Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617, 626 (N.D. Cal. 1991) the court enjoined "demonstrating, picketing, distributing literature, or counseling within twenty-five (25) feet of any entrance" to plaintiff's clinic.[4] It described that provision of its order as creating a "free zone" which defendants may not enter and "which gives plaintiff and its patients some breathing space." Id. at 625.

The "free zone" created by the preliminary orders here was designed for a similar purpose -- to enable patients parking in plaintiff's parking lot, immediately east of the clinic, to walk through the "free zone" and into the Zabriskie Street entrance to the clinic building without passing through the ranks of the protestors. However, as noted, the loss of parking spaces in the lot next to the building, the repeated violations of the orders, and the protestors' "swarming" tactics have combined to frustrate the intent of the order. The requested modification is justified -- and indeed necessary.

The new "free zone" requested by plaintiff represents

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[4] The 25 feet included an area within a shopping center which, under applicable California law (the court said), constituted a public area comparable to a public street.

something of an increase in size -- but not a change in principle. Prohibiting the presence of demonstrators on the north side of Zabriskie Street, from the east end of plaintiff's parking lot, west to Main Street, will allow patients to walk relatively peaceful and free of molestation and confrontation from where they can park their cars to the building entrance. It should eliminate, or at least minimize, the ugly confrontations, intimidations, and frightening conditions which have repeatedly occurred during the last few years.

At the same time, the protestors will remain free to exercise their First Amendment rights, and the restriction on that exercise will be kept to a minimum. They can convey their message from the south side of Zabriskie Street -- about 40 feet away. Anyone who wishes to speak to them, read their literature or gain their counseling, can easily walk that short distance for that purpose. Placards and sings on the south sidewalk will be easily visible from across the street, and the voices of the demonstrators, in normal tones, projected only to carry across a relatively narrow street, should be clearly audible.[5]

In short, the restrictions will meet the constitutional requirements that they (1) be content neutral; (2) be as narrowly drawn as reasonably possible to serve the competing interest (plaintiff's lawful operations); and (3) leave the defendants with adequate alternate means to convey their message.

B. Noise Limitations

Plaintiff also asks that the court impose noise

Zabriskie Street appears to be a lightly travelled street, primarily serving only businesses and residences in the area.

limitations, including the prohibition of chanting, singing, shouting, or any other noise that enter plaintiff's premises and interferes with its operations. Plaintiff notes, correctly, that other courts have imposed such restrictions. See, e.g., Northeast Women's Center v. McMonagle, 745 F. Supp. 1082, 1095-1096 (E.D. Pa. 1990); Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617, 626 (N. D. Cal. 1991); Portland Feminist Women's Health Center v. Advocates for Life, 859 F. 2d. 681 (9th Cir. 1988) (affirming noise restriction against charge that absence of a decibel limitation rendered order unconstitutionally vague).

Unlike some of those cases,[6] however, plaintiff's testimony here said little about the activities which afflicted its patients while entering or leaving its clinic. While it pointed out that four windows in its waiting room front on Zabriskie Street, and Ms. Weiselberg testified that the patients' condition was directly and adversely affected by activities outside the building, it is not clear how significant the noise factor, by itself, was and will be.

The newly created "free zone" along the north side of Zabriskie Street also complicates this issue. Since demonstrators will now be on the south side of the street, their communications to the north side will necessarily involve some voice projection. How much, and at what point the "noise" would unreasonably interfere with activities inside

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In the Portland case, for example, there is considerable discussion of the adverse effects of the high noise level; difficulty in holding conversations within the clinic; incomplete or inaccurate patient histories; and testimony of a direct relationship between the noise level and the condition of the patients.

the clinic could raise difficult and subjective questions.

Further, if the new "free zone" provides the intended relief for plaintiff and its patients, some infusion of noise may be less disruptive than it has been heretofore, when it was combined with other confrontational activities. The requirement that limitations on constitutional rights of free speech be kept to the minimum necessary to protect plaintiff's countervailing rights, suggests caution in imposing limitations which may not, in fact, be necessary.

Sound amplification and chanting or singing which is heard inside plaintiff's clinic, however, is a different matter. There is no discernible need for the demonstrators to engage in those activities in order to convey their message. Thus, since they are likely to cause disruption, they will be enjoined. Broader noise restrictions, however, will not be entered. If they should subsequently prove necessary, plaintiff may then submit an appropriate request for additional, post-judgment relief.

C. Additional Limits Requested by Plaintiff

(1) The Request to Limit Demonstration to One Day Per Week.

As noted, plaintiff generally performs abortions three days a week. If there are demonstrations on each such occasion, there would be some 150 days of demonstrations per year. Plaintiff claims that is excessive and asks that demonstrations be limited to one day per week.

Plaintiff submits no convincing rationale for such a limitation. Since, presumably, different patients generally visit the clinic on different days, such a restriction would effectively prevent demonstrators from conveying their

message to a substantial number of plaintiff's patients.[7] Given that negative effect on the protestors' ability to exercise their constitutional right and absent a showing by plaintiff of the need for such a restriction, no limitation will be imposed on the number of days of permitted demonstrations during any calendar period.

(2) The Request to Restrict the Statement on Demonstrators' Placards.

Citing a restraint which it says was imposed by the court in Northeast Women's Center v. Mc Monagle, 745 F. Supp. 1082,10915 (E. D. Pa. 1990), plaintiff asks that demonstrators be limited in the content of the placards they carry while picketing. Plaintiff does not precisely articulate what should be permitted and what prohibited and what prohibited on those signs.

Plaintiff's reference to Northeast Women's Center is not completely accurate. In that case, the court prohibited certain activities within 500 feet of plaintiff's facility. It allowed an exception to that restriction for one "informational table," and on that table it permitted one sign "displaying words of an informational, non-inflammatory and non-violent nature." So far as appears, there was no such restrictions on other signs of placards used by the demonstrators.

That specific limitation certainly does not support the general restriction proposed by plaintiff on all of the demonstrators' signs or placards. Plaintiff submits no justification for such a restraint which certainly approaches,

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The testimony was that abortion patients generally visit the clinic twice: first for an examination and to schedule the procedure, and second, for the abortion itself.

if it does not clearly violate, the requirement of "content-neutral" regulation.[8] Accordingly, the request to limit the context of demonstrators' signs or placards will be denied.

Conclusion

A permanent injunction will be issued containing the restraints described above. It will enjoin the "John Does" referred to in the complaint, and all other persons having notice of the restraint.

The named defendants will be bound by the injunction in the same manner as others having notice of the restraints. They were not shown to have engaged in the unlawful 1989 acts not to have violated the preliminary restraints. Thus, there is no basis for nay more specific, or greater, restraint against them than against others who may wish to demonstrate at the Women's Choice premises. As to the propriety of enjoining unnamed and unknown parties against future conduct prohibited by an injunctive order, see e.g., Portland Feminist Women's Center v. Advocated for Life, 859 F. 2d at 687; Northeast Women's Center v. McMonagle, 745 F. Supp. at 1093.

The attorney for plaintiff will kindly submit an

Plaintiff itself suggests that because of the "content-neutral" requirement, there be no limit on epithets from the protestors aimed at plaintiff's patients, such as "murderers," "child killers," etc. Query, whether such limits could be sustained under the "fighting words" limitation on free speech rights? See, e.g., the prohibition of such statements imposed in Planned Parenthood of Monmouth County v. Cannizzaro, 204 N.J. super. 531, 544 (Ch. Div. 1985).

appropriate form of judgment.

WITH THE COURT
MAR 27 1992
ARTHUR J. LESEMANN
J.S.C.

SAVERIO V. CERESTE
1624 CENTER AVENUE
P.O. BOX 845
FORT LEE, NEW JERSEY 07024
(201) 944-4213
ATTORNEY FOR PLAINTIFF

WOMEN'S CHOICE OF BERGEN COUNTY, P.A. A PROFESSIONAL SERVICE CORPORATION OF NEW JERSEY	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO. C-4053-89-E
vs.	CIVIL ACTION
JOHN DOE AND OTHER UNKNOWN AND UNIDENTIFIED PERSONS AND ORGANIZATIONS INCLUDING BUT NOT LIMITED TO WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO AND MICHELE STERLACE-ACCORSI, Defendants	ORDER

This matter having been opened to the Court by Saverio V. Cereste, Esq., attorney for Plaintiff, in the presence of Keith E. Paterson, Esq., attorney for the Defendants; and upon the testimony of witnesses for Plaintiff heard in open court, and the exhibits in evidence, in support of the allegation of the Complaint, and the testimony of witnesses for the Defendants in opposition thereto at hearings held on December 2, 3 and 4, 1991; and the reasons stated in the Court's opinion filed in this matter;

IT IS on this 27th day of March, 1992;

ORDERED that, the named Defendants and all persons or organizations acting in concert or combination with the named Defendants and all person having knowledge of this ORDER, be and the same are hereby enjoined and restrained as follows:

(a) From entering upon the property of the Plaintiff at 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises, and from obstructing vehicular or pedestrian access to the property;

(b) From gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling within an area bordered by the south curb line of Zabriskie Street on the south, the easterly side line of Main Street on the west, the easternmost end of Plaintiff's parking lot on the east and Plaintiff's building line on the north, said area being more particularly delineated as the cross-hatched ares on the diagram attached hereto as Exhibit A;

(c) From chanting, singing or suing any sound amplification devices for verbal communications; in a volume which can be heard within Plaintiff's premises; and, it is

FURTHER ORDERED that a copy of the within Order shall be served upon the Chief of Police of the City of

Hackensack, so that the within Order and restraints shall be implemented and enforced; and, it is

FURTHER ORDER, that a copy of the within Order shall be served upon Keith E. Paterson, Esq., attorney for the Defendants, within 7 days of the date hereof; and, it is

FURTHER ORDERED, that a copy of the within Order shall be served upon any of the Defendants and upon any persons demonstrating, picketing, patrolling, distributing literature, counseling or exhibiting any other behavior restrained or enjoined by the Order, who may be present at or near the property of the Plaintiff, by distributing and disseminating this Order to any such persons.

ARTHUR J. LESEMANN, J.S.C.

EXHIBIT A

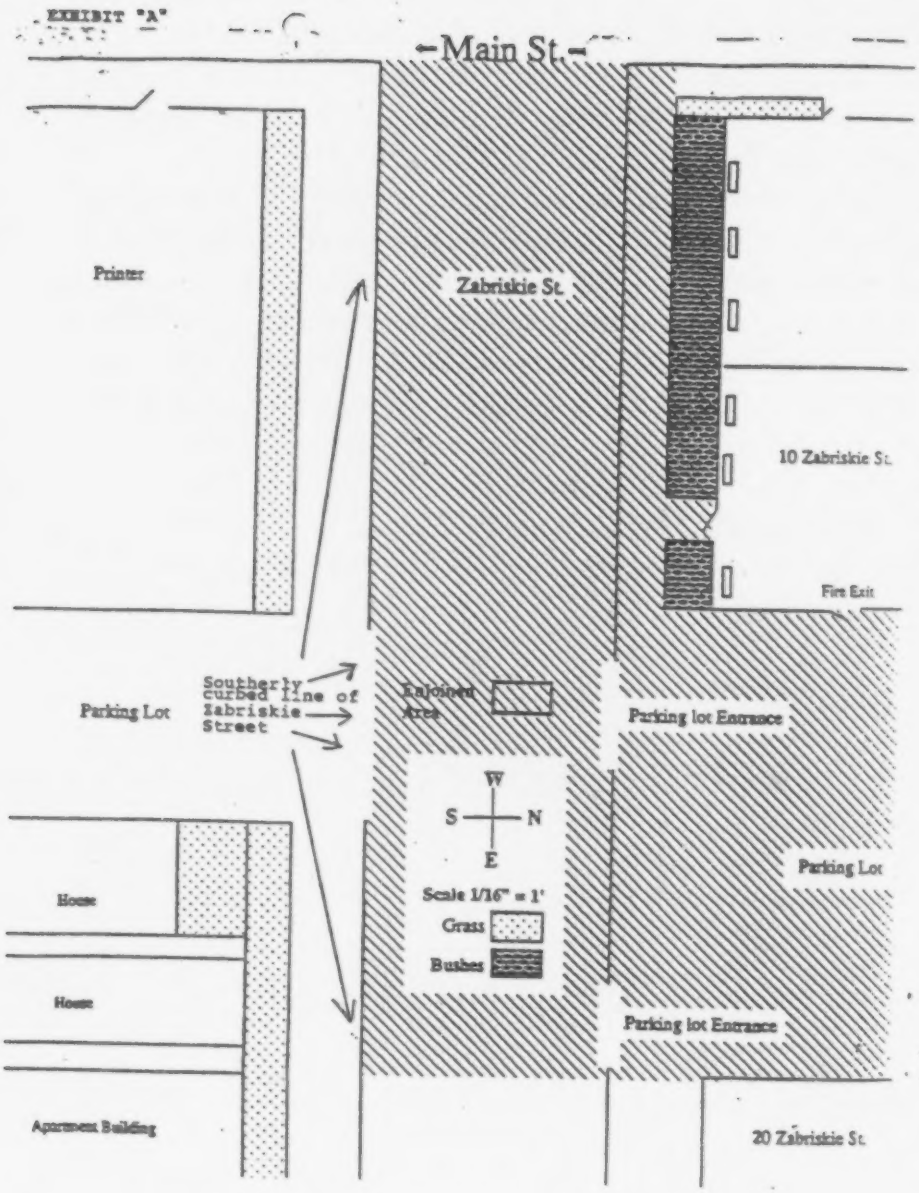


EXHIBIT "A"
Main St.
Printer
Zabriskie St.
10 Zabriskie St.
Fire Exit
Parking Lot
Southerly curbed line of Zabriskie Street
Enjoined Area
Parking lot Entrance
W
S
N
E
Scale 1/16" = 1'
Grass
Bushes
Parking Lot
House
House
Apartment Building
Parking lot Entrance
20 Zabriskie St.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4679-91T3

WOMEN'S CHOICE OF BERGEN COUNTY, P.A., A Professional Service Corporation of New Jersey,

Plaintiff-Respondent,

v.

JOHN DOE and OTHER UNKNOWN and UNIDENTIFIED PERSONS and ORGANIZATIONS, including but not limited to WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI,

Defendants-Appellants.

Argued May 25, 1993 - Decided July 1, 1993

Before Judges Pressler, R.S. Cohen and Muir, Jr.

On appeal from the Superior Court,
Chancery Division, Bergen County

Keith E. Paterson argued the cause for appellants.

Saverio V. Cereste argued the cause for respondent (James A. Caporrino on the brief).

PER CURIAM

This is an appeal by defendants in a Chancery Division suit from an order granting an injunction limiting anti-abortion demonstrations and other activities in the vicinity of plaintiff's clinic in Hackensack. The order was entered after a plenary hearing and on the basis of a comprehensive and thoughtful written opinion. In bare outline, the injunction barred entering on plaintiff's property, including the parking lot; obstructing access to the property; picketing and demonstrating within a described area near plaintiff's property, and making verbal communications at a volume which would be audible within plaintiff's premises. Defendants appealed; we affirm.

Before us, defendants argue that the injunction is impermissibly overbroad, that it is not a valid time, place and manner restriction on speech, that it was unwarranted because there was no showing defendants intended to do what was enjoined, and because there were adequate remedies at law. We have thoroughly considered defendants' arguments in the light of the evidence adduced in the Chancery Division.

We are satisfied that the judge's findings of fact were supported by adequate credible evidence in the record and that his conclusions of law are accurate. We therefore affirm substantially for the reasons stated by Judge Arthur J. Lesemann in his formal written opinion dated February 19, 1992. We also believe that the injunction order is fully

consistent with the sound recent opinions of our colleagues in Horizon Health Center v. Felicissimo, ____ N.J. Super. __ (App. Div. March 24, 1993), petition for certification pending; Boffard v. Barnes, __ N.J. Super. __ (App. Div. April 12, 1993), petition for certification pending; and Murray v. Lawson, __ N.J. Super. __ (App. Div. April 12, 1993), petition for certification pending. Affirmed.

SUPREME COURT OF NEW JERSEY
C-121 September Term 1993
37,215

ON PETITION FOR CERTIFICATION

WOMEN'S CHOICE OF
BERGEN COUNTY, etc.,
Plaintiff-Respondent,

v.

JOHN DOE, et al.,
Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4679-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted, and the matter is summarily remanded to the Chancery Division for reconsideration in light of Horizon Health Center v. Felicissimo, ___ N.J. ___ (1994).

WITNESS, the Honorable Robert L. Clifford, Presiding Justice Trenton, this 5th day of April, 1994.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE
COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:BERGEN COUNTY
DOCKET NO. C-4053-89E

SUPPLEMENTAL OPINION

WOMEN'S CHOICE OF BERGEN COUNTY,
P.A., a Professional Service
Corporation of New Jersey,

Plaintiff,

vs.

JOHN DOE and OTHER UNKNOWN AND
UNIDENTIFIED PERSONS AND
ORGANIZATIONS INCLUDING BUT NOT
LIMITED TO WALTER J. ROBOKOFF,
KATHLEEN BATES, STEVE NATIELLO,
and MICHELE STERLACE-ACCORSI,

Defendants.

Decided: March 14, 1995

Saverio V. Cereste, for plaintiff
(Cereste & Caporrino)

Keith E. Paterson, for defendants

ARTHUR J. LESEMANN, J.S.C.

INTRODUCTION

On March 27, 1992, this court entered a judgment limiting demonstrations at plaintiff's abortion clinic in Hackensack, New Jersey. The judgment followed a trial held in December, 1991, and was based on conclusions embodied in a formal opinion dated February 19, 1992.

The heart of the judgment was the creation of a so-called "free zone" in front of and around the entrance to plaintiff's facility. It also contained limitations on the use of sound amplification devices by demonstrators and limitations on chanting or singing in the area of the clinic.

On May 12, 1992, defendants appealed that judgment, and on July 1, 1993, the Appellate Division affirmed, "substantially for the reasons stated" in this court's formal opinion.

Defendants then sought certification from the New Jersey Supreme Court. While that matter was pending, the Supreme Court decided Horizon Health Center v. Felicissimo, 135 N.J. 26 (1994), which also dealt with limitations on demonstrations at an abortion clinic. In view of that decision, the Supreme Court, on April 6, 1994, granted the petition for certification in this case and remanded the matter "for reconsideration in light of" the Horizon decision.

This court then set a schedule for the parties to comment on the effect of Horizon. Briefs were submitted and oral argument held. However, before this court issued its

anticipated supplemental decision, the United States Supreme Court decided Madsen v. Women's Health Center, U.S. , 114 S. Ct. 2516, 129 L.Ed. 593 (1994), which also dealt with permissible limitations on demonstrations at an abortion clinic. In view of Madsen, additional briefs were invited and received, this time focusing mainly on the effect of the Madsen decision on this case.

This court has now considered all of those supplemental briefs, the oral arguments previously submitted, as well as the actual decisions in Horizon and Madsen. For the reasons set out below, the court concludes there is no basis to modify the judgment entered on March 27, 1992.

I. PERSONS BOUND BY THE JUDGMENT OF MARCH 27, 1992.

Defendants' first claim is that this court's judgment may limit and affect only those persons who were found to have interfered with plaintiff's operation of its clinic. They ask vacation of that portion of the judgment which applies it not only to the named defendants, but also to all persons acting in concert with them and all persons having notice of the restraint.

This court found that the demonstrations described in its opinion violated plaintiff's right to operate its clinic free from unlawful interference. It also concluded that the restrictions imposed were necessary to insure protection of those rights. Clearly, if those restrictions are to be effective in protecting plaintiff's rights, they must be applied to everyone demonstrating at plaintiff's clinic.

To say that certain named persons cannot demonstrate

within the "free zone" created by the court's injunction, but others can, would insure that the designed relief would be ineffective. The concept of some demonstrators being limited to activities outside the "free zone"--across the street from the clinic or east or west of the proscribed area--while others demonstrate directly in front of plaintiff's door, would be absurd, unfair, and unworkable. To create two "classes" of demonstrators would insure the failure of the court's attempt to balance and protect the rights of both sides--plaintiff's right to conduct its business free of unlawful interference, and the demonstrators' rights of free speech.

Defendants' claim that Horizon Health Center v. Felicissimo supports this argument is misplaced.

One of the arguments raised in Horizon was that the relief granted by the trial court was not "content neutral." Since the restraints were entered only against the anti-abortion group known as the Helpers, it was said, they would obviously restrain only the views of that group--viz, only anti-abortion speech, and not pro-choice speech.

The court rejected the argument, with Justice Clifford noting that

> Merely because an injunction restricts only a specified group does not make that injunction content based. Courts always tailor injunctive relief to address the specific facts presented to them. See R. 4:41-4. The injunction in this case restrains only the Helpers and those acting in concert with them because only those persons actually interfered with the functioning of the Center. (135 N.J. at p. 143.)

That was the context in which the Supreme Court made the statements which defendants say support their claim here. The court's comments contained no suggestion, let alone a holding, that an otherwise proper injunction could not restrain all persons from demonstrating in an area where the trial court had found it necessary to carve out a "safe zone." Neither Horizon nor any other controlling decision mandates such a self-defeating, anomalous result. No case which upholds the creation of a "free zone," or "buffer zone," suggests the need to create a two tier system whereby some persons (those not found to have previously violated plaintiffs' rights) may demonstrate within the "free zone," and others (those found to have violated) may not. Given the finding that the "free zone" is a necessary and proper means to protect plaintiffs' rights, there is no reason to conclude that anyone who chooses to do so may interfere with those rights on at least one occasion, before he or she is prohibited from doing so again.

II. CREATION OF A "FREE ZONE."

Defendants' second claim is that, in view of the Horizon decision, this court should relax its injunction and permit demonstrators and "sidewalk counselors" within the prohibited zone on the north side of Zabriskie Street, including the area directly in front of the entrance to plaintiffs' clinic.

It is true that in Horizon, the Supreme Court set aside some of the restrictions that had been imposed by a trial court. But it did so while noting that the "crafting of an injunctive order imposing place restrictions" is "peculiarly fact sensitive." In Horizon, the Court found that the record did not justify all of the restrictions imposed by the trial

court. But that record is significantly different from ours.

As just one dramatic example of that marked difference, in Horizon, the Court noted that the plaintiffs had made no complaints to the police. In this case, the plaintiffs had made some fifty complaints, with the police appearing on the scene thirty or thirty-five times.

There is no need to repeat or summarize here the extensive findings of fact set out in this court's earlier opinion. Suffice it to say that those findings provided ample support--indeed, they demonstrated the absolute necessity--of the restrictions embodied in this court's order. And, it should be recalled, the Appellate Division agreed with that conclusion.

Horizon does not hold or suggest that on facts such as those here, the injunction issued by this court is too broad or, for any other reason, should be set aside. Horizon requires no change in this court's prior reasoning and conclusions.

Nor does the Madsen decision require any such modification. Madsen, in fact, expressly sustained an injunctive order creating a "free zone" not significantly different than that created here.

It is true that in Madsen the Supreme Court rearticulated, in somewhat modified form, the applicable test to measure the constitutional validity of limitations on picketing at an abortion clinic. Under that restated test, one must show that the restraint will "burden no more speech than necessary to serve a significant government interest." Although those words were not used in this court's earlier decision, their application to the case at hand does not lead to

a different conclusion.

In framing the injunction embodied in its March, 1992, order, this court set out to impose only such minimal, necessary restraints as would be necessary to preserve the plaintiffs' rights to conduct their business. That test is not significantly different from that articulated in Madsen. Under either expressed criterion, the aim must be to minimize curtailment of constitutional free speech rights and impose limitations only to the extent necessary to preserve the countervailing rights of the clinic operators to function and perform their lawful activities. And that is what was done here.

III. THE NOISE LIMITATIONS.

This court also finds no reason to modify the injunctive provisions concerning noise regulation in the area of plaintiffs' clinic.

> The March, 1992, order enjoins demonstrators, from chanting, singing, or using any sound amplification devices for verbal communications in a volume which can be heard within plaintiff's premises.

This court's rationale for that provision of its order is set out at pages 23 and 24 of its opinion. The criterion employed did not attempt to prohibit unamplified speech which might penetrate into plaintiffs' clinic. Nor did it attempt to define what would seem difficult, if not impossible, to define: when and under what circumstances such speech would be disruptive to plaintiffs' activities.

Indeed, this court assumed that some noise would likely enter the clinic and might well have some disruptive effect upon plaintiffs' staff and patients. But since it was impossible to determine how disruptive such noise would be--particularly in view of the "place restrictions" imposed under other portions of the injunction--the court declined to enjoin any form of unamplified speech based on its volume or the possibility of disturbance or disruption:

> The requirement that limitations on constitutional rights of free speech be kept to the minimum necessary to protect plaintiff's countervailing rights, suggests caution in imposing limitations which may not, in fact, be necessary. (Opinion, p. 24)

This court found, however, that sound amplification and chanting or singing was a "different matter." None of those activities was necessary to the demonstrators' ability to convey their message. And since they were more likely to cause disruption, those activities were enjoined.

In Horizon, the Supreme Court set aside the trial court's noise restriction and said that the injunction to be imposed should "focus more sharply on the actual problem caused by the noise of the protest." It substituted language of its own for that of the trial court, so that the demonstrators now would be enjoined

> from screaming, chanting, singing, speaking, yelling, or producing noise in any other manner in a volume that interferes with the provision of medical services within the Center.

The Supreme Court did not deal with a restraint such as that embodied in this court's injunction. Absent some ruling from the Supreme Court, or the Appellate Division, rejecting this court's attempt to impose a reasonable, minimal, and objective standard for accommodating both the rights of the plaintiffs and the defendants, there is no apparent reason why the formula chosen here should be rejected. While the court in Horizon employed a different test, that decision does not hold or imply that the formula employed here must be rejected.

CONCLUSION

For the foregoing reasons, this court is satisfied that neither Horizon Health Center v. Felicissimo nor Madsen v. Women's Health Center require any modification of this court's prior decision and its affirmance by the Appellate Division. The judgment entered on March 27, 1992, will remain in effect. The attorney for plaintiff will kindly submit an appropriate form of order.

SAVERIO V. CERESTE
1624 CENTER AVENUE
P.O. BOX 845
FORT LEE, NEW JERSEY 07024
(201) 944-4213
ATTORNEY FOR PLAINTIFF

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET NO. C-4053-89E
Civil Action - ORDER

WOMEN'S CHOICE OF BERGEN COUNTY, P.A., a Professional Service Corporation of New Jersey,
Plaintiffs

vs.

JOHN DOE AND OTHER UNKNOWN AND UNIDENTIFIED PERSONS AND ORGANIZATIONS INCLUDING BUT NOT LIMITED TO WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO AND MICHELE STERLACE-ACCORSI,
Defendants

This matter being opened to the Court on remand from the Supreme Court of New Jersey after a grant of a petition for certification for reconsideration in light of Horizon Health Center v. Felicissimo, 135 N.J. `26 (1994); and upon notice to the law offices of Cereste & Caporrino, attorneys for Plaintiff, and Keith E. Paterson, Esq., attorneys for

Defendants; and the Court having considered on remand the briefs and argument of counsel; and for the reasons stated in the Court's supplemental opinion dated March 14, 1995; and the Court having found no basis to modify the judgment entered on March 27, 1992, and for good cause shown;

IT IS on this 7th day of April, 1995;

ORDERED that, the named Defendants and all persons or organizations acting in concert or combination with the named Defendants and all persons having knowledge of this ORDER, be and the same are hereby enjoined and restrained as follows:

(a) From entering upon the property of the Plaintiff at 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises, and from obstructing vehicular or pedestrian access to the property;

(b) From gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling within an area bordered by the south curb line of Zabriskie Street on the south, the easterly side line of Main Street on the west, the easternmost end of Plaintiff's parking lot on the eat and Plaintiff's building line on the north, said area being more particularly delineated as the cross-hatched area on the diagram attached hereto as Exhibit A;

(c) From chanting, singing or using any sound amplification devices for verbal communications in a volume which can be heard within Plaintiff's premises; and it is

FURTHER ORDERED that a copy of the within Order shall be served upon the Chief of Police of the City of

Hackensack, so that the within Order and restraints shall be implemented and enforced; and it is

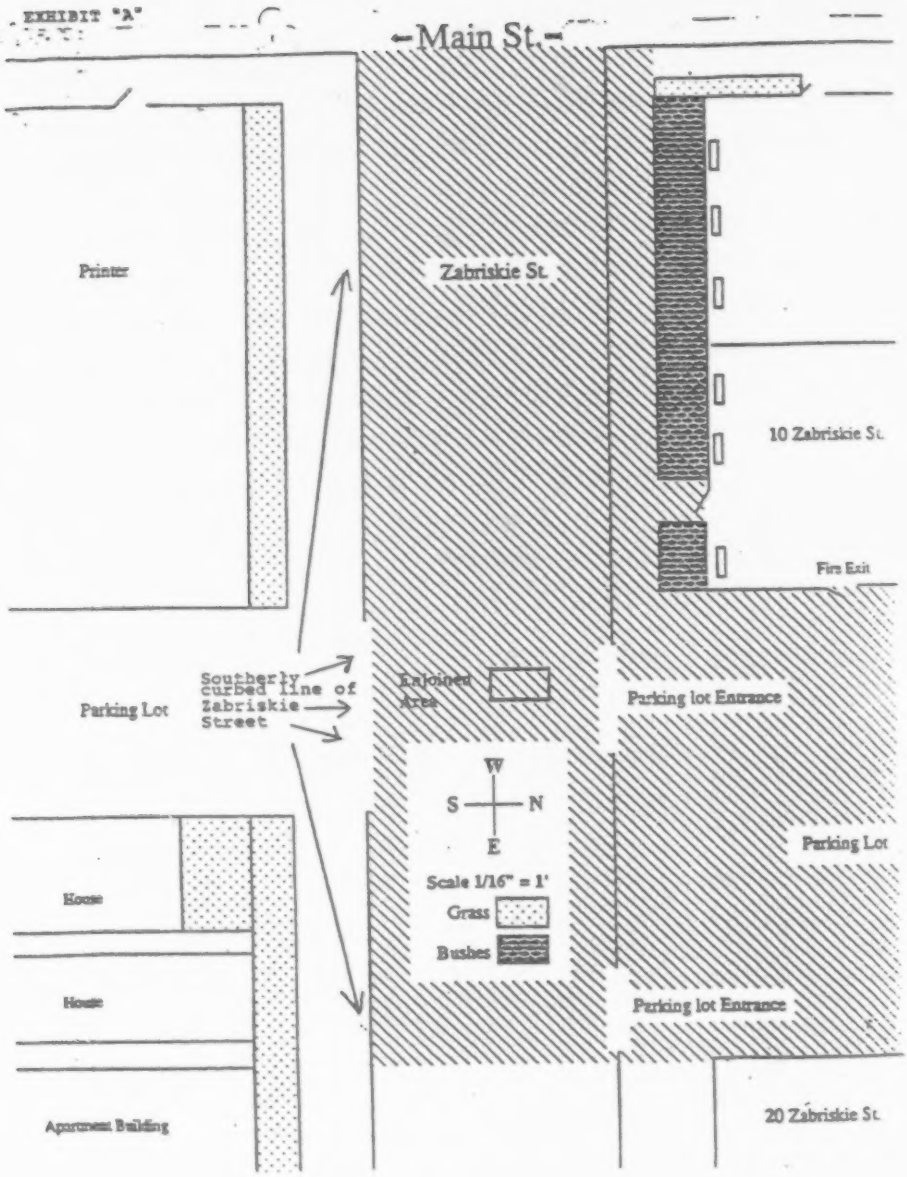
FURTHER ORDERED, that a copy of the within Order shall be served upon Keith E. Paterson, Esq., attorney for the Defendants, within 7 days of the date hereof; and it is

FURTHER ORDERED, that a copy of the within Order shall be served upon any of the Defendants and upon any persons demonstrating, picketing, patrolling, distributing literature, counseling or exhibiting any other behavior restrained or enjoined by this Order, who may be present at or near the property of the Plaintiff, by distributing and disseminating this Order to any such persons.

/s/ Arthur J. Lesemann, J.S.C
ARTHUR J. LESEMANN, J.S.C.

EXHIBIT "A"

EXHIBIT "A"


Main St.
Printer
Zabriskie St.
10 Zabriskie St.
Fire Exit
Parking Lot
Southerly curbed line of Zabriskie Street
Enjoined Area
Parking lot Entrance
W
S
N
E
Scale 1/16" = 1'
Grass
Bushes
Parking Lot
House
House
Apartment Building
Parking lot Entrance
20 Zabriskie St.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5102-94T1

WOMEN'S CHOICE OF BERGEN COUNTY,
P.A., a Professional Service
Corporation of New Jersey,
Plaintiff-Respondent,

vs.

JOHN DOE AND OTHER UNKNOWN AND
UNIDENTIFIED PERSONS AND
ORGANIZATIONS INCLUDING BUT NOT
LIMITED TO WALTER J. ROBOKOFF,
KATHLEEN BATES, STEVEN NATIELLO AND
MICHELE STERLACE-ACCORSI,
Defendants-Appellants.

Submitted April 3, 1996 - Decided April 25, 1996

Before Judges King, Landau and Kleiner.

On appeal from Superior Court, Chancery Division, Bergen County.

Keith E. Paterson, attorney for appellants.

Cereste & Caporrino, attorneys for respondent (James A. Caporrino, on the brief).

PER CURIAM

The above-captioned defendants appeal from an order entered by the Chancery Division, Bergen County, on April 7, 1995, which retained intact a previously entered injunctive order following the Supreme Court's remand for reconsideration. As in Horizon Health Center v. Felicissimo, 282 N.J. Super. 323 (App. Div. 1995), certif. denied, 142 N.J. 574 (1995) (Horizon II), we affirm but modify the injunctive order.

Plaintiff Women's Choice of Bergen County, P.A., performs first-trimester abortions at its Hackensack clinic. In 1992, following plenary trial, an injunctive order was entered restricting the manner and location of defendants' anti-abortion picketing at the Hackensack facility. The order provided in pertinent part that:

> the named Defendants and all persons or organizations acting in concert or combination with the named Defendants and all persons having knowledge of this ORDER, be and the same are hereby enjoined and restrained as follows:
>
> (a) From entering upon the property of the Plaintiff at 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises, and from obstructing vehicular or pedestrian access to the property;
>
> (b) From gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling within an area bordered by the south curb line of

> Zabriskie Street on the south, the easterly side line of Main Street on the west, the easternmost end of Plaintiff's parking lot on the east and Plaintiff's building line on the north, said area being more particularly delineated as to cross-hatched area on the diagram attached hereto as Exhibit A;
>
> (c) From chanting, singing or using any sound amplification devices for verbal communication in a volume which can be heard within Plaintiff's premises.

An exhibit attached to the order contained a diagram delineating the area within which defendants were restricted from "gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling ...."[9]

The injunctive order was affirmed by this court in 1993, but the Supreme Court granted certification and, on April 6, 1994, summarily remanded to the Chancery Division for reconsideration in light of Horizon Health Center v. Felicissimo, 135 N.J. 126 (1994) (Horizon I). Women's Choice v. Doe, 136 N.J. 294 (1994).

Several argument hearings were held in 1994, during which evolving case law including Madsen v. Women's Health Center, ___ U.S. ___, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), and the New Jersey Supreme Court decision in Horizon I was considered. No new facts were adduced.

The Chancery judge then entered the April 7, 1995

See Appendix A annexed.

order, supported by a written opinion dated March 14, 1995. It continued, unmodified, the restraints previously entered.

Defendants contend on appeal that the injunction is inconsistent with Horizon in that it "should bar only those persons who actually interfered with the [Women's Choice] Center," or alternatively, that the injunction should permit "a limited, controlled forum of expression on the sidewalk directly in front of Women's Choice." Further, defendants say that the restraints on noise volume should be limited, as in Horizon I, to noise that interferes with provision of medical services within the center, rather than broadly excluding any sound or communication that can be heard within plaintiff's premises.

Citing Madsen, supra, defendants also urge that the injunction should be vacated entirely because of insufficient showing of past or prospective imminent violations of law; and because it "burdens more speech than necessary to serve a significant governmental interest." Defendants note that an injunction requires a more restrictive standard of review than would a generally applicable legislative enactment such as an ordinance.

We disagree with defendants' Madsen-based contentions. Our review of Judge Lesemann's 1992 opinion and the record of the plenary trial satisfies us that there was ample basis for the findings of trespass, physical and mentally intimidating coercion, disruptive conduct, and violation of preliminary restraints made by the judge. Moreover, the specifically named defendants represented that they intervened in this case because "they feel that they're acting on behalf of any person who has an interest in being at the premises."

Consistent with R. 4:54-4, the present injunction is directed at "the named defendants and all persons and organizations acting in concert or combination with the named defendants and all persons having knowledge of this Order ...." Given the commonality of interest expressed by the named defendants with the John Doe defendants initially joined, we believe that Judge Lesemann acted correctly and reasonably in enjoining defendants-appellants. He concluded that it would be unfair and unworkable for purposes of the injunction to create two classes of demonstrators, based upon distinguishing those identified as having engaged in the harassing and disruptive conduct from those who were not known to have done so. We agree.

The judge carefully evaluated the configuration and location of the Women's Choice site, including its parking lot,a nd created a buffer zone, which he endeavored to tailor to its specific needs based upon the nature and extent of the conduct of demonstrators both before and after lesser preliminary restraints were entered.

We recognize, as did the Supreme Court, that "some deference must be given to the state court's familiarity with the facts." Madsen, supra, ___ U.S. at ___, 114 S.Ct. at 2527, 129 L.Ed.2d at 610-11. Moreover, much as in Madsen, the street in front of the Women's Choice clinic is narrow, so that the signs and voices of protesters who are required to remain on the opposite side of the street readily can be seen and heard.

We conclude, moreover, that subject to necessary modifications of the same general nature as we required in Horizon II, the injunction complies substantially with the most recent articulation of the Supreme Courts of the United

States and New Jersey in this area. See Lawson v. Murray, __ U.S. ___, 115 S.Ct. 44, 130 L.Ed.2d 6 (1994); Madsen, supra; Murray v. Lawson, 138 N.J. 206 (1005_'; Horizon I, supra; see also 18 U.S.C.A. § 248, enacted in 1994. Further refinement may be forthcoming, as the U.S. Supreme Court has granted review of the Second Circuit's en banc opinion in Pro-Choice Network v. Schenck, 67 F.3d 377 (2d Cir. 1995).[10] See Schenck v. Pro-Choice Network, ___ U.S. _ , 116 S.Ct. 1260, ___ L.Ed.2d ___ (1996). At the time Horizon II was decided, the Schenck en banc rehearing was pending. A prior opinion had been withdrawn from publication. See Horizon II, supra, 282 N.J. Super., at 329 n.6.

In approving the creation of a buffer zone here, we accept as well-founded the history of repetitive disruptive and emotionally upsetting conduct by demonstrators, which has been recounted by Judge Lesemann, as well as his special knowledge of the physical layout and its setting. Nonetheless, we do not perceive the differences between the Horizon and Women's Choice scenarios to be so great as to justify imposition of an injunction that prohibits any and all form of expression or counselling efforts within the substantial buffer zone found to be appropriate by the judge. Both cases involved evidence of intimating and profoundly

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The en banc ruling in Schenck upheld against First Amendment attack an injunction that imposed a "'floating' 15-foot buffer zone between anti-abortion protesters and abortion clinic entrances or persons entering or leaving clinic[s], but allow[ed] two protesters to engage in non-threatening counseling within [the] zone unless [the targeted] patient expresses [a] desire to be left alone." 64 U.S.L.W. 3615, 1615 (Mar. 19, 1996).

distressing interaction between demonstrators and patients, and of the potential for adverse medical consequences resulting from confrontational and non-confrontational speech exercised at the respective sites.

The goal of the remand in Horizon I, and presumably in the present case as well, was to craft an injunction that allowed defendants to express their views, but in "a manner that does not interfere with or disrupt the Center, its patients, or its staff." Horizon I, supra, 135 N.J. at 143.

As we observed in Horizon II, supra, 282 N.J. Super. at 326, the Supreme Court required the fashioning of a fact-sensitive injunction with a reasonable buffer zone that allowed some form of expression by defendants near the clinic entrance, giving consideration to the role of sidewalk counselling, yet protecting patients and others from harassment. See Horizon I, supra, 135 N.J. at 153.

Much as in Horizon II, our perception of the unmodified injunction in this case is that it effectively precludes any expressional activity in front of the Women's Choice facility or near its principal entrance.[11]

We think it significant, too, that the Supreme Court itself recrafted the noise restraints in the Horizon I injunction to provide that the defendant demonstrators desist "from screaming, chanting, singing, yelling, or producing noise in

---

Unlike the Horizon Health Center, the Women's Choice facility has only one regular doorway. There is also an emergency door, said to have been pressed into use during defendants' demonstrations.

any other manner, in a volume that interferes with the provision of medical services within the Center ...." Horizon I, supra, 135 N.J. at 150 (emphasis added); see also Options v. Lawson, 287 N.J. Super. 209, 217 (App. Div. 1996). By contrast, in order to avoid having to make subjective appraisals of what constitutes interference, the present injunction totally enjoined noise or communications "in a volume which can be heard within Plaintiff's premises." Similar prohibitions of any noise which can be heard inside a clinic have been upheld. See, e.g., Northeast Women's Ctr v. McMonagle, 939 F.2d 57, 63 (3d Cir. 1991); Planned Parenthood Ass'n v. Project Jericho, 556 N.E.2d 157, 161-63, (Ohio 1990).

In reviewing the terms of the unmodified injunction, we are informed by the language of the summary remand order that its reconsideration be "in light of Horizon Health Center v. Felicissimo" (Horizon I). We have also given consideration to Judge Lesemann's better knowledge of the Women's Choice site and the extent and nature of anti-abortion protestors' conduct at that site. As noted above, we do not modify the generally applicable place restrictions, including the substantial buffer zone deemed necessary by Judge Lesemann because of prior conduct and violations of the preliminary injunction. However, we believe that the mandate expressed upon remand in this case does require some modification of the place and manner restrictions of the injunction. See the discussion in Horizon II, supra, 282 N.J. Super. at 325-31. In order to minimize delay in final resolution of this protracted matter, we exercise our original jurisdiction, R. 2:10-5, to amend the decretal portions of the injunction to read as follows:

(b) Except as set forth in paragraph d.

f[F]rom gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling within an area bordered by the south curb line of Zabriskie Street on the south, the easterly side line of Main Street on the west, the easternmost end of Plaintiff's parking lot on the east and Plaintiff's building line on the north, said area being more particularly delineated as the cross-hatched area on the diagram attached hereto as Exhibit A;

(c) From chanting, singing or using any sound amplification devices or verbal communications in a volume [~~which can be heard~~] that interferes with the provision of medical services within Plaintiff's premises; and

(d) Only quiet sidewalk counseling of a non-threatening nature shall be permitted on the sidewalk within the buffer zone by not more than two sidewalk counselors who must stop counseling when a targeted individual indicates a desire to be left alone, provided that no entrance is obstructed; and it is ....

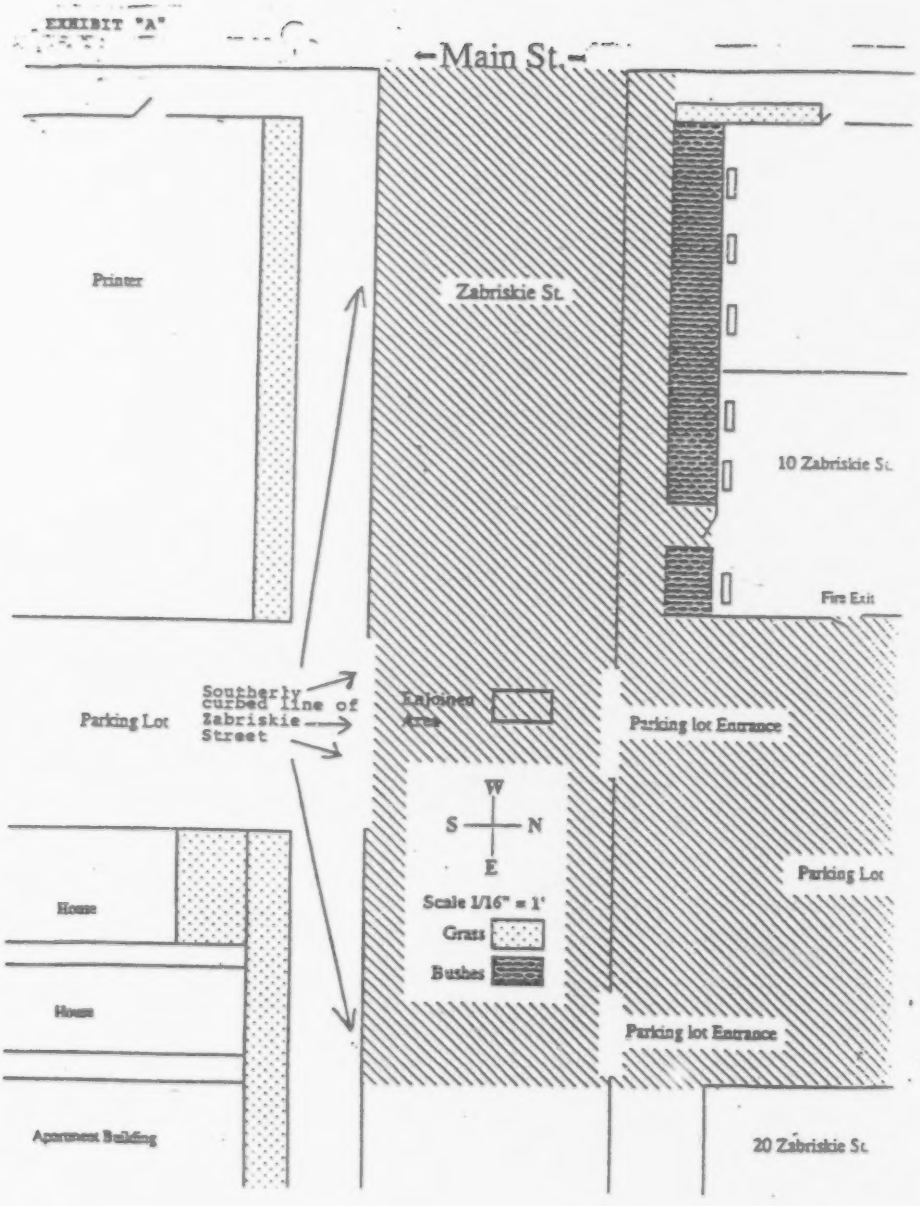
Consistent with the concerns manifested in Horizon I, the amendments allow limited quiet non-intimidating counseling on the sidewalk within the buffer zone of persons who have not expressed a desire to be left alone. The amendment also conforms the noise limitation to that laid down by the Supreme Court in Horizon I.

As modified, we affirm the order under review. We remand solely for entry of an injunctive order consistent with

this opinion.

EXHIBIT "A"

EXHIBIT "A"


Main St.
Printer
Zabriskie St.
10 Zabriskie St.
Fire Exit
Parking Lot
Southerly curbed line of Zabriskie Street
Enjoined Area
Parking lot Entrance
W
S
N
E
Scale 1/16" = 1'
Grass
Bushes
Parking Lot
House
House
Apartment Building
Parking lot Entrance
20 Zabriskie St.

KEITH E. PATERSON, ESQ.
1339 Tabor Road
P.O. Box 21
Mt. Tabor, NJ 07878
(201) 625-0044
Attorney for Defendants

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MORRIS COUNTY
DOCKET NO. C-4053-89E
Civil Action - ORDER

WOMEN'S CHOICE OF BERGEN COUNTY, P.A., a Professional Service Corporation of New Jersey,
Plaintiffs

vs.

JOHN DOE AND OTHER UNKNOWN AND UNIDENTIFIED PERSONS AND ORGANIZATIONS INCLUDING BUT NOT LIMITED TO WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO AND MICHELE STERLACE-ACCORSI,
Defendants

This matter having been opened to the court on remand from the Appellate Division of the Superior Court after an appeal taken by defendants, Keith E. Paterson, Esq. having appeared for defendants and Cereste and Caporrino, Esqs. having appeared for plaintiff, and the Appellate Division having issued an opinion dated April 25, 1996 which

modifies the injunction, in part, and having remanded the matter to the Chancery Division for entry of an injunctive order consistent with that opinion, and for good cause shown;

It is on this 25th day of June, 1996

ORDERED that, the named defendants and all persons or organizations acting in concert or combination with the named defendants and all persons having knowledge of this order, be and the same are hereby enjoined and restrained as follows:

(a) From entering upon the property of the plaintiff at 10 Zabriskie Street, Hackensack, New Jersey, including the parking lot of said premises, and from obstructing vehicular or pedestrian access to the property;

(b) Except as set forth in Paragraph (d), from gathering, parading, patrolling, picketing, demonstrating, distributing literature and counseling within an area bordered by the south curb line of Zabriskie Street on the south, the easterly side line of Main Street on the west, the easternmost end of plaintiff's parking lot on the east and plaintiff's building line on the north, said area being more particularly delineated as the cross-hatched area on the diagram attached hereto as Exhibit A;

(c) From chanting, singing or using any sound amplification devices or verbal communications in a volume that interferes with the provision of medical services within plaintiff's premises;

(d) Only quiet sidewalk counseling of a non-threatening nature shall be permitted on the sidewalk within

the buffer zone by not more than two sidewalk counselors who must stop counseling when a targeted individual indicates a desire to be left alone, provided that no entrance is obstructed; and it is

FURTHER ORDERED that a copy of the within order shall be served upon the Chief of Police of the City of Hackensack by defendants' attorney, so that the within order and restraints shall be implemented and enforced; and it is

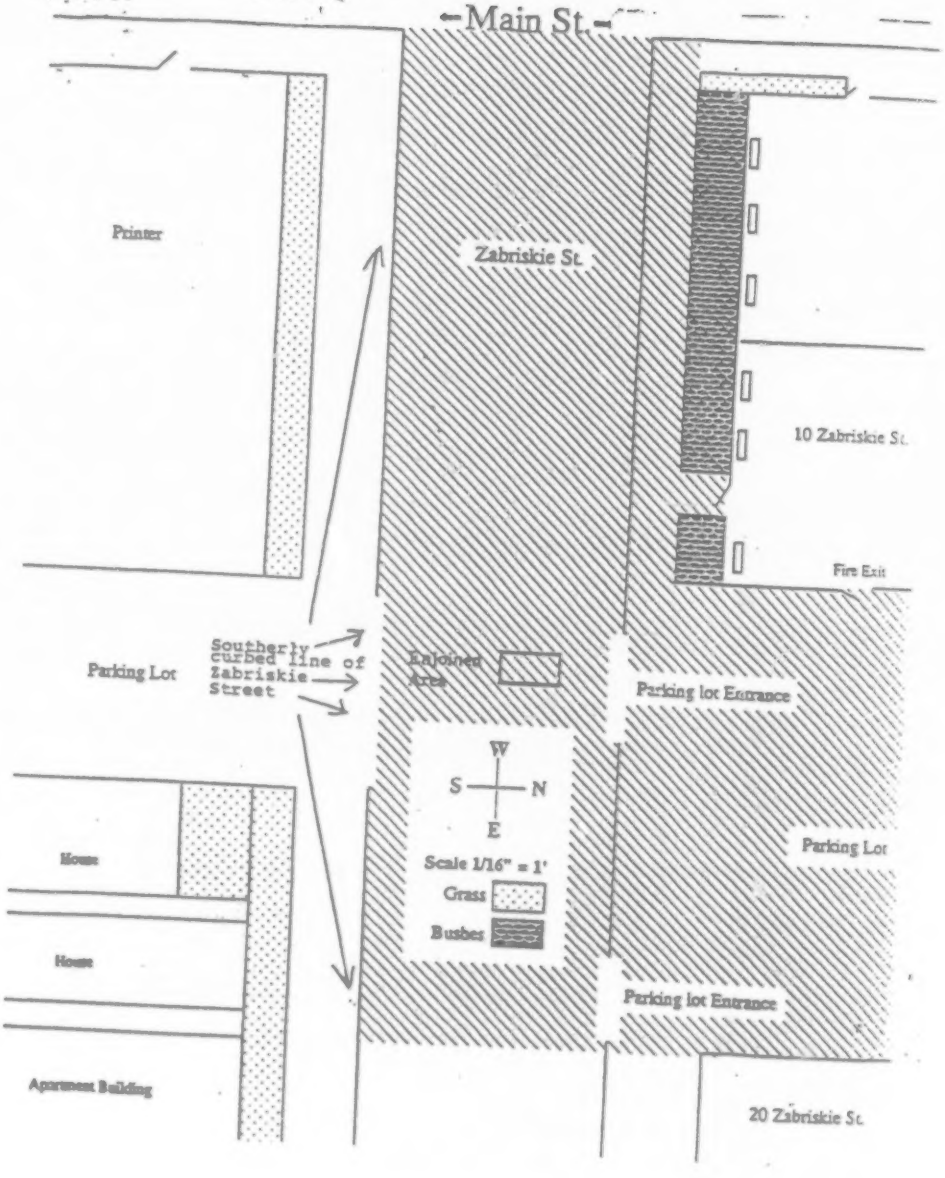
FURTHER ORDERED that defendants' attorney shall serve a copy of the within order upon Ceraste and Caporrino, Esqs., attorneys for the plaintiff, within days of the date hereof; and it is

FURTHER ORDERED that a copy of the within order shall be served, by plaintiff's attorneys or plaintiff, upon any of the defendants and upon any persons demonstrating, picketing, patrolling, distributing literature, counseling or exhibiting any other behavior restrained or enjoined by this order, who may be present at or near the property of the plaintiff, by distributing and disseminating this order to any such persons.

/s/ Arthur J. Lesemann
ARTHUR J. LESEMANN, J.S.C.

EXHIBIT "A"

EXHIBIT "A"


Main St.
Printer
Zabriskie St.
10 Zabriskie St.
Fire Exit
Parking Lot
Southerly curbed line of Zabriskie Street
Enjoined Area
Parking lot Entrance
W
S
N
E
Scale 1/16" = 1'
Grass
Bushes
Parking Lot
House
House
Apartment Building
Parking lot Entrance
20 Zabriskie St.

SUPREME COURT OF NEW JERSEY
C-124 September Term 1996
42,335

ON PETITION FOR CERTIFICATION

WOMEN'S CHOICE OF
BERGEN COUNTY, etc.,
Plaintiff-Respondent,

v.

JOHN DOE, et al.,
Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5102-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice at Trenton, this 25th day of September 1996.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
C-125 September Term 1996
42,335

ON CROSS-PETITION FOR CERTIFICATION

WOMEN'S CHOICE OF
BERGEN COUNTY, etc.,
Plaintiff-Respondent,

v.

JOHN DOE, et al.,
Defendants-Petitioners.

To the Appellate Division, Superior Court:

A cross-petition for certification of the judgment in A-5102-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice at Trenton, this 25th day of September 1996.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

(2)

No. 96-1015

Supreme Court, U.S.
FILED
JAN 27 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

REVEREND WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO AND MICHELE STERLACE-ACCORSI,

Petitioners,

vs.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

JAMES A. CAPORRINO
Counsel of Record
CERESTE & CAPORRINO
Attorneys for Respondent
1624 Center Avenue
P.O. Box 845
Fort Lee, New Jersey 07024
(201) 944-4213

70433 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

18 pp

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the Order in question since the decision of the New Jersey Superior Court, Appellate Division is consistent with this court's decision in *Madsen v. Women's Health Center,* 114 S. Ct. 2516 (1994), as well as other decisions of this Court?

2. Whether an individually named defendant, who voluntarily intervened in a cause of action for injunctive relief, can claim that he/she should not be enjoined in the same manner as all other persons with notice of the injunction?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Statement of the Case	1
A. Course Of Proceedings And Disposition Of The Case Below	1
Reasons for Denying the Writ	4
I. The Petition For Writ Of Certiorari Must Be Denied Because This Court Has Already Addressed The Issues Raised By Petitioner And There Is No Conflict With Applicable Decisions Of This Court.	4
II. Petitioners Cannot Voluntarily Thrust Themselves Into An Existing Cause Of Action For Injunctive Relief And Then Later Claim That They Were Improperly Enjoined.	10
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Fischer v. City of St. Paul, 894 F. Supp. 1318 (1995) . 7

Horizon Health Center v. Felicissimo, 135 N.J. 126 (1994) 3

Johnson v. Mansfield Hardwood Lumber Co., 143 F. Supp. 826, *aff'd*, 242 F.2d 45 (W.D. La. 1956) ... 11

Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994) ..... i, 3, 4, 5, 6, 7, 8, 9

Northeast Women's Center v. McMonagle, 745 F. Supp. 1082 (1990) 11, 12

Portland Feminist Women's Center v. Advocates for Life, 859 F.2d 681 (1988) 11, 12

Pro-Choice of Western New York v. Schenck, 67 F.3d 311 (2d Cir. 1995), *cert. granted*, __ U.S. __, 116 S. Ct. 1260 (1996) 7

United States v. New York Telephone Co., 434 U.S. 159 (1977) 10

United States Constitution Cited:

First Amendment 8

Contents

Page

Rules Cited:

New Jersey Court Rule 4:33-2 10

New Jersey Court Rule 4:52-4 9

Other Authorities Cited:

43 C.J.S. *Injunctions* Sec. 29 (1978) 11

43A C.J.S. *Injunctions* Sec. 251 (1978) 10

STATEMENT OF JURISDICTION

Respondent submits that this Court does not have jurisdiction to review the Order in question by Writ of Certiorari because neither have the courts of the state of New Jersey decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor have they decided an important question of federal law that has not been settled by this Court, or in a way that conflicts with relevant decisions of this Court.

In addition, none of the possible questions presented by the Petitioners bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaty or laws of the United States.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Of The Case Below

The Respondent, Women's Choice of Bergen County, P.A. (hereinafter "Women's Choice"), submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Reverend Walter J. Robokoff, Kathleen Bates, Steven Natiello and Michele Sterlace-Accorsi. The Petitioners appeal the decision of the New Jersey Supreme Court denying Certification.

The proceedings began on July 13, 1989, when Women's Choice, a private-for-profit corporation engaged in the practice of obstetrics and gynecology, including lawful first trimester abortions, filed a Verified Complaint and Order to Show Cause

against John Doe and Other Unknown and Unidentified Persons and Organizations as a result of intimidating, harassing and disruptive picketing and demonstrating at Respondent's premises, including obstruction of the walkways and entrances to Respondent's facility and harassment and intimidation of Respondent's patients and staff. An Order to Show Cause with temporary restraints was entered returnable July 27, 1989. On August 8, 1989, an Interlocutory Injunction was entered, which, inter alia, restrained and enjoined the Defendants and all persons acting in concert with Defendants from: (1) entering upon the property of the Plaintiff; (2) obstructing vehicular or pedestrian access to the property; (3) disrupting, intimidating or harassing patients and staff of the Plaintiff; (4) making and shouting verbal communications, of the nature of but not limited to "murderers" and "baby killers", and using mechanical amplification equipment for making such communications; (5) picketing or patrolling within an area bounded by the easternmost part of the parking lot serving Plaintiff's building and a point twenty-five feet west of the public sidewalk entrance to Plaintiff's premises.

On November 17, 1989, a Motion to Intervene was filed by Petitioners. On January 4, 1990 an Order was entered permitting the Petitioners to file an Answer. The case then proceeded as a plenary matter. In 1991, prior to trial, protesters at Petitioner's facility began a systematic pattern of conduct, which while adhering to the letter of the Interlocutory Injunction, circumvented its restrictions and undercut its effectiveness. The matter was tried on December 2, 3 and 4, 1991. On February 19, 1992, the trial court issued its opinion and a final Order was entered on March 27, 1992. The final Order, removing all content based restrictions contained in the Interlocutory Injunction and expanded the buffer zone imposed by way of the Interlocutory Injunction. The Order restricted the activities of the defendants to the sidewalk directly across the narrow street from

Respondent's premises. On May 27, 1992, Petitioners filed a Notice of Appeal. On July 1, 1993, the New Jersey Superior Court, Appellate Division affirmed the trial court's Order and on July 20, 1993, Petitioners filed a Notice of Appeal and Notice of Petition for Certification with the New Jersey Supreme Court.

On April 6, 1994, the New Jersey Supreme Court granted the Petition for Certification and summarily remanded the matter to the trial court for reconsideration in light of its decision in the matter of *Horizon Health Center v. Felicissimo,* 135 N.J. 126 (1994). On March 14, 1995, the trial court issued a supplemental opinion which maintained its March 27, 1994, Order in full force and effect. On April 7, 1995, the trial court entered an Order incorporating the provisions of the March 27, 1994 injunction.

On May 17, 1995, Petitioners appealed the trial court's April 7, 1995, Order. The Appellate Division affirmed the trial court's decision, but modified the injunctive order to permit two sidewalk counselors to offer limited, quiet, non-intimidating counseling on the sidewalk within the buffer zone to individuals who do not indicate a desire to be left alone. Following the Appellate Division's decision, Petitioners filed a Petition for Certification with the New Jersey Supreme Court and Respondent filed a Cross Petition for Certification. Both Petitions were denied on September 25, 1996. Petitioner filed the Petition for Writ of Certiorari with this Court on December 23, 1996.

Respondent submits that this Court should not grant the Petition for Writ of Certiorari because the injunction is fully consistent with the principles set forth in *Madsen,* as well as other decisions of this Court and the questions presented by Petitioners have been subject to conclusive determinations by this Court. Moreover, Petitioners have provided no legal basis

to support their contention that they should not be subject to the terms of the injunction, which enjoins them only in the same manner as any other person with notice of the injunction.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED BECAUSE THIS COURT HAS ALREADY ADDRESSED THE ISSUES RAISED BY PETITIONER AND THERE IS NO CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court must not exercise judicial discretion by granting the Petition for Writ of Certiorari because the questions presented by Petitioner were directly addressed by this court in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). This Court's decision in *Madsen* makes it clear that a trial court has the authority to impose content neutral injunctive restrictions on the activities of the Petitioners when the restrictions burden no more speech than necessary to serve a significant government interest.

The facts in *Madsen* are strikingly similar to the facts of the within matter. In the case at bar, demonstrators gathered in front of Respondent's clinic, blocking entry to the driveway to Respondent's parking lot, blocking entry to the sole public entrance, trespassing upon Respondent's parking lot, shouting at and accosting Respondent's patients and staff and thrusting literature and plastic model fetuses in patients' faces. The trial record is replete with unrebutted and graphic testimony relating to the effects which the demonstrations had on Respondent's patients and its business. As noted by the trial court,

> There is no question that those actions went far beyond mere speech. The protesters blocked the entrance to plaintiff's clinic. They intimidated plaintiff's patients by confronting them face to face — often only inches apart. They made it difficult and often impossible for them to move freely from their cars to the entrance to plaintiff's building. They did not merely offer information or opinion; they thrust their opinions at their targets orcefully, often physically and obtrusively. The conclusion is inescapable that they did more than seek to persuade. They sought to obstruct plaintiff's operation — and to a considerable extent, they succeeded.

Women's Choice, C-4053-89E (Ch. Div. Feb. 19, 1992) (App. 23, 24).

The trial court also found that while the interlocutory injunction was in place, "[V]iolations became more frequent, and the change of tactics by the protesters — swarming toward prospective patients as they approached the clinic — undercut the effectiveness of the free zone . . ." *Id.* (App. 24) The Court, therefore, entered a final injunction which was broader than the interlocutory injunction and which enabled patients to use Respondent's facility relatively free of confrontation and intimidation, while still allowing the defendants' message to be heard.

In *Madsen,* this Court had an opportunity to review the constitutionality of an injunction entered by a Florida state court which prohibited demonstrations in the area of respondent's health center, at which abortions were performed. This Court held that the creation of a thirty-six (36) foot "buffer zone",

within which demonstrations of any kind, including sidewalk counseling, was prohibited was constitutional. In upholding generally applicable place restrictions, including the buffer zone, the Court recognized that "The need for a complete buffer zone near clinic entrances and driveways may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties." *Madsen,* 114 S.Ct. at 2527 (1994).

The Petitioners in *Madsen* picketed and demonstrated ". . . where the public street gives access to the clinic." *Madsen,* 114 S. Ct. at 2516 (1994). Accordingly, in September, 1992, a Florida state court enjoined demonstrators from ". . . blocking or interfering with public access to the clinic and from physically abusing persons entering or leaving the clinic." *Id.* at 2518. Six months later, after finding repeated violations of the initial injunction, the state court issued a much broader injunction. This Court held that, "The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order." *Id.* at 2527.

The case at bar is analogous to *Madsen.* The defendants engaged in intimidating and harassing picketing and demonstrating at Respondent's premises, which included obstruction of walkways and access to Respondent's facility. Additionally, the interlocutory injunction was later rendered ineffective as a result of continued aggressive and intimidating conduct of the defendants. Accordingly, the injunctive relief properly enjoins Petitioners. The trial judge put it succinctly. "Given the finding that the 'free zone' is a necessary and proper means to protect plaintiff's rights, there is no reason to conclude that anyone who chooses to do so may interfere with those rights on at least one occasion, before he or she is prohibited from doing so again." *Women's Choice,* C-4053-89E (Ch. Div. March 14, 1995) (App. 44).

In the matter *sub judice,* Petitioners' interpretation of *Madsen,* namely, that the injunction may only enjoin those persons who were found to have interfered with plaintiff's operation of the clinic, is flawed. The New Jersey Appellate Division reviewed the constitutionality of the injunction in question in light of *Madsen* and deferred to the Chancery Division's judgment that, "Clearly, if those restrictions are to be effective in protecting plaintiff's rights, they must be applied to everyone demonstrating at plaintiff's clinic." *Women's Choice,* C-4053-89E at 3 (Ch. Div. March 14, 1995) (App. 42). The named Petitioners are being enjoined no more than any other persons with notice of the injunction. "To say that certain named persons cannot demonstrate within the 'free zone' created by the court's injunction, but others can, would insure that the designed relief would be ineffective." *Id.* (App. 42, 43).

The trial judge further found that, "No case which upholds the creation of a 'free zone', or 'buffer zone', suggests the need to create a two tier system whereby some persons (those not found to have previously violated plaintiffs' rights) may demonstrate within the 'free zone', and others (those found to *have* violated) may not." *Id.* (App 44). Noticeably, Petitioners have not cited one case to support a position to the contrary.

Buffer zones, similar to the one created in the within matter, have been consistently held constitutional. For example, in *Pro-Choice of Western New York v. Schenck,* 67 F.3d 311 (2d Cir. 1995), *cert. granted,* __ U.S. __, 116 S. Ct. 1260 (1996), the Court upheld an injunction prohibiting demonstrations within a fifteen (15) foot buffer zone around an abortion clinic and requiring that sidewalk counselors cease and desist from counseling patients within the zone upon a patient's expression of a desire to be left alone. *See also Fischer v. City of St. Paul,* 894 F. Supp. 1318, 1329 (1995).

Additionally, the subject injunction burdens no more speech than necessary to serve a significant interest. In *Madsen,* this Court addressed Petitioners' contention that the injunction herein, by restricting the speech of parties not involved in the prior picketing and demonstrating, burdens more speech than necessary to serve a significant interest. This Court held that the thirty-six (36)-foot buffer zone around the clinic entrances and driveways burdens no more speech than necessary to accomplish the government interest at stake. *Madsen,* 114 S. Ct. at 2527 (1994).

Moreover, in *Madsen,* the trial court balanced the free speech rights of the demonstrators with respondent's right to provide lawful medical services and the rights of its patients to receive medical treatment and services. This court held that the state's interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy and the state's interest in ensuring the public safety and order, the free flow of traffic on public streets and the property rights of its citizens were significant enough to justify the injunction. *Id.* at 2526.

Likewise, the New Jersey Appellate Division balanced Petitioners' First Amendment free speech rights, including Petitioners' right to voice their anti-abortion message, against the property and privacy rights of Respondent and its patients. The Appellate Division upheld the injunction, albeit in modified form, concluding that the "[T]he injunction complies substantially with the most recent articulation of the Supreme Courts of the United States and New Jersey in this area." *Women's Choice,* A-5102-94T1 (App. Div. April 25, 1996) (App. 57, 58).

Moreover, Petitioner erroneously asserts that the Appellate Division's reasoning fails to measure up to the standard in

Madsen without providing any legal or factual basis for this assertion. Petitioner quotes a selective section of the New Jersey Appellate Division opinion which states, "[I]t would be unfair and unworkable for purposes of the injunction to create two classes of demonstrators, based upon distinguishing those identified as having engaged in the harassing and disruptive conduct from those who were not known to have done so." *Women's Choice,* C-4053-89E (App. Div. April 25, 1996) (App. 57); asserting that Petitioners were enjoined based on this rationale alone. Yet, significantly, Petitioners chose to ignore the full text of the opinion in which the Court engaged in a careful and in-depth analysis of the interests at stake before so holding and rendering judgment.

The New Jersey Appellate Division noted that the present injunction was consistent with New Jersey Court Rule 4:52-4, which states in pertinent part, "Every order granting an injunction and every restraining order . . . is binding only upon such parties to the action and such of their officers, agents, employees, and attorneys, and upon such persons in active concert or participation with them as receive actual notice of the order by personal service or otherwise." The Appellate Division held that it was proper to enjoin the Petitioners because of the ". . . commonality of interest expressed by the named defendants with the John Does initially joined, . . ." *Women's Choice,* A-5102-94T1 (App. Div. April 25, 1996) (App. 57).

As conclusively determined at all levels of the within litigation, the injunction, enjoining Petitioners, burdens no more speech than necessary to serve a significant government interest. Accordingly, the subject Order is fully consistent with this court's decision in *Madsen,* as well as all other relevant decisions of this court.

II.

PETITIONERS CANNOT VOLUNTARILY THRUST THEMSELVES INTO AN EXISTING CAUSE OF ACTION FOR INJUNCTIVE RELIEF AND THEN LATER CLAIM THAT THEY WERE IMPROPERLY ENJOINED.

The trial court allowed Petitioners to intervene in this action pursuant to New Jersey Court Rule 4:33-2, which sets forth, "Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common." At the time Petitioners filed their Motion to Intervene, they were aware that a temporary restraining order had been issued, an interlocutory injunction was in effect and the case was proceeding toward a final hearing. Petitioners knew that Respondent sought injunctive relief and voluntarily intervened; thereby subjecting themselves to the jurisdiction of the Court.

It is well settled that named parties, their officers, agents, servants, employees, attorneys and persons in active concert or participation with them who receive actual notice of a judgment are bound by the injunction or restraining order. 43A C.J.S. *Injunctions* Sec. 251 (1978). Petitioners urge that there must be a showing that each of them individually has violated or imminently will violate some provision of statutory or common law. However, injunctions may extend to persons, "[W]ho though not parties to original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). Furthermore, if the commission of a wrongful act will injure a plaintiff and in order to obtain a remedy at law, it would be required to bring many actions against many persons, plaintiff is entitled to an injunction to prevent the performance of the act, where the rights

of all depend on the same questions of law and fact. 43 C.J.S. *Injunctions* Sec. 29 (1978); *see also Johnson v. Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826, *aff'd*, 242 F.2d 45 (W.D. La. 1956).

As the New Jersey Chancery Division held, and as was later affirmed by the New Jersey Appellate Division,

> No case which upholds the creation of a "free zone," or "buffer zone," suggests the need to create a two tier system whereby some persons (those not found to have previously violated plaintiff's rights) may demonstrate within the "free zone," and others (those found to *have* violated) may not. Given the finding that the "free zone" is a necessary and proper means to protect plaintiffs' rights, there is no reason to conclude that anyone who chooses to do so may interfere with those rights on at least one occasion, before he or she is prohibited from doing so again.

Women's Choice, C-4053-89E (Ch. Div. March 14, 1995) (App. 44).

Moreover, the federal courts have gone farther than the New Jersey courts by affirming the propriety of enjoining unnamed and unknown parties against future conduct prohibited by its order. *See e.g. Portland Feminist Women's Center v. Advocates for Life*, 859 F.2d at 681 (1988); *Northeast Women's Center v. McMonagle*, 745 F. Supp. 1082 (1990). In *Portland*, appellants contended that the injunction, which enjoined right-to-life advocates and all persons, groups and organizations acting in concert with them from shouting, screaming, chanting, or yelling during on-site demonstrations and from producing noise

by any other means which substantially interferes with the provision of medical services within the women's clinic, was overbroad in that "its language reaches individuals and groups not responsible for the disruptive conduct." *Portland,* 859 F.2d at 687. The *Portland* court looked at the reach of the injunction and concluded, "There is no basis for concern that one who is unaware of the injunction can be found in contempt for violating it, nor that it will have a chilling effect on parties neither before the court nor in active cooperation with the advocates." *Id.* at 687.

Similarly, in an abortion clinic's action against abortion protesters based on, inter alia, an interference with contract claim, the court was not required to limit the scope of the injunction only to those individuals that the jury found liable for that claim. *Northeast Women's Center v. McMonagle,* 745 F. Supp. 1082 (1990). The United States District Court for the District of Pennsylvania held, "[E]njoining merely the activities of the named defendants will be wholly insufficient to protect plaintiff and its staff and patients from the continued harassment, assaults and intimidation, which they have regrettably endured and will, inevitably continue to endure unless a more complete injunction is issued." *Id.* at 1094.

The *Portland* and *McMonagle* courts upheld the creation of free zones and recognized the necessity of including unnamed and unknown defendants with notice of the injunction. Thus, in the case at bar, where Petitioners voluntarily intervened in the cause of action, they are properly bound by the terms of the injunction. Exempting Petitioners from the injunction would afford Petitioners special status; status above all other persons with knowledge of the injunction.

CONCLUSION

For all of the foregoing reasons, the Respondent, Women's Choice of Bergen County, P.A., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAMES A. CAPORRINO
Counsel of Record
CERESTE & CAPORRINO
Attorneys for Respondent
1624 Center Avenue
P.O. Box 845
Fort Lee, New Jersey 07024
(201) 944-4213

Supreme Court, U.S.
FILED
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(3)

No. 96 - 1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WALTER J. ROBOKOFF, KATHLEEN BATES, STEVEN NATIELLO and MICHELE STERLACE-ACCORSI,

Petitioners,

v.

WOMEN'S CHOICE OF BERGEN COUNTY, P.A., A Professional Service Corporation of New Jersey,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF OF PETITIONERS

RICHARD F. COLLIER, JR. (Counsel of record)
RICHARD J. TRAYNOR
KEITH E. PATERSON
LEGAL CENTER FOR THE DEFENSE OF LIFE, INC.
65 Madison Avenue
Morristown, NJ 07960
(201) 984-0725

TPP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. This Court's Grant Of Certiorari in *Schenck v. Pro-Choice Network*, No. 95-1065 Indicates That, Contrary To The Assertions Of The Respondent, There Is A Continuing Need For This Court To Monitor The Misinterpretation And Misapplication of Its Decision In *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) 1

CONCLUSION 4

TABLE OF AUTHORITIES

Page(s)

CASES

Healy v. James, 408 U.S. 169 (1972). 3

Hirsh v. City of Atlanta, 495 U.S. 927 (1990) 2

Lawson v. Murray, 115 S. Ct. 2264, 2265,
132 L.Ed.2d 269, 270 (1995) 2

Madsen v. Women's Health Center,
512 U.S. 753, 114 S.Ct. 2516,
129 L.Ed.2d 593(1994) . . . . . 1, *passim*

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 3

Schenck v. Pro-Choice Network,
67 F.3d 359 (2d Cir. 1994),
modified 67 F.3d 377 (2d Cir. 1995) (in banc),
cert. granted 116 S.Ct. 1260, 134 L.Ed.2d 209 (1996)
No. 95-1065 . . . . . 1, *passim*

ARGUMENT

I. This Court's Grant Of Certiorari in *Schenck v. Pro-Choice Network*, No. 95-1065 Indicates That, Contrary To The Assertions Of The Respondent, There Is A Continuing Need For This Court To Monitor The Misinterpretation And Misapplication of Its Decision In *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed.2d 593 (1994).

This court recently granted certiorari in the case of *Schenck v. Pro-Choice Network Of Western New York*, No. 95-1065, a case very similar to the present matter. 116 S.Ct. 1260, 134 L.Ed.2d 209 (1996). The Second Circuit in *Schenck* upheld an injunction prohibiting peaceful, non-threatening speech on public sidewalk outside an abortion facility in the absence of a showing that access to the facility was obstructed. 67 F.3d 359 (2d Cir. 1994), *modified* 67 F.3d 377 (2d Cir. 1995) (in banc). The Second Circuit held that expressive activity must yield to injunctive restraint even if "no one is physically injured, traffic moves, and private property is not invaded," *id at 397*. This Court found the decision in *Schenck* sufficiently disturbing to grant certiorari.

The present matter is even more compelling than the decision in *Schenck*. The original Chancery Division opinion, found in our Appendix at A-10, states at p. A-30 that:

> The named defendants will be bound by the injunction in the same manner as others having notice of the restraints. *They were not shown to have engaged in the unlawful 1989 acts nor to have violated the preliminary restraints*. (Emphasis supplied)

Ours is a case in which the named defendants were

specifically found by the Court to have done nothing wrong. Yet, they are to be bound by the injunction in the same manner as "others having notice of the restraints." In our case, the "offense" arises merely from knowing the terms of the injunction, and the penalty is a deprivation of one's right to converse on a public sidewalk.

Moreover, as set forth in our Petition, there has never been a finding that any individual committed any unlawful act at the premises. The allegations of the Respondent's Brief, aside from being relatively innocuous, have never been attributed to any particular individual. The Respondents in this case, like those in *Schenck*, have essentially been given a "free ride", and not required to show that "the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'" *Madsen, supra.* Certainly the Respondent should be required to make a more specific showing of illegal activity in order to deprive the Petitioners of their right to engage in First Amendment activity on a public sidewalk. An injunction against lawful picketing by individuals who have conducted their picketing in a lawful manner in the past is an unconstitutional prior restraint. *See Lawson v. Murray,* 115 S. Ct. 2264, 2265, 132 L.Ed.2d 269, 270 (1995) (Scalia, J., concurring); *Hirsh v. City of Atlanta*, 495 U.S. 927 (1990) (Stevens, J., concurring).

In *Madsen*, this Court confronted a "36-foot buffer zone around the clinic entrances and driveway," 114 S. Ct. at 2530. This Court upheld the zone in part and struck it down in part. *Id.* Insofar as this Court upheld the 36-foot zone, its ruling reflected the highly unusual factual circumstances at the abortion facility in Melbourn Florida.

The *Madsen* defendants had "repeatedly" interfered with the physical access of patients and staff, *id.* at 2526. A previous, narrower injunction had failed to protect that access, *id.* at 2527-28. This Court went on to say that "absent evidence that [defendants] . . . have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, [a] buffer zone fails to serve the significant government interests" at stake. *Id.* at 2528.

Like the New Jersey courts in the present case, the Second Circuit in *Schenck* rejected two crucial factors in the *Madsen* analysis: first, the need for initial resort to a narrower, nonspeech-restrictive injunction before imposing broader restrictions; and second, the need for a showing of pervasive lawbreaking to which the broader injunction provides a remedial measure. These factors are *not* mere incidental features of *Madsen;* rather, they represent essential constitutional predicates.

The Chancery Division in the present case went even further than the Second Circuit in *Schenck*, by specifically finding that the named defendants had done nothing wrong. Instead, the Chancery Division makes the Petitioners guilty by association *with persons who have never been identified by the Respondent or the Court, and who are unknown to the Petitioners.* Such an egregious affront to the First Amendment cannot be allowed to continue. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Healy v. James*, 408 U.S. 169 (1972).

CONCLUSION

Both the Second Circuit and the Supreme Court of New Jersey have misapplied this Court's recent decision in *Madsen* in such a way as to deprive innocent persons of their First Amendment rights. The recent grant of Certiorari in *Schenck v. Pro-Choice Network* appears to be an implicit recognition of this. In order to redress this deprivation, and to avoid conflicting interpretations of *Madsen*, the Court should grant the instant Petition and reverse the judgment below. In the alternative, the court should grant the instant Petition, vacate the judgment below, and remand this case to the New Jersey courts for reconsideration in light of the ultimate decision in *Schenck v. Pro-Choice Network*.

Respectfully submitted,

RICHARD F. COLLIER, JR.
Legal Center for the Defense of Life, Inc.
65 Madison Avenue
Morristown, New Jersey 07960
(201) 984-0725
Attorney for Petitioners

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